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THE

LAW OF CARRIERS,

INN-KEEPERS, WAREHOUSEMEN,

AND OTHER

DEPOSITORIES OF GOODS FOR HIRE.

BY HENRY JEREMY, ESQ.

OF THE MIDDLE TEMPLE.

"Necessitas inducit privilegium quoad jura privata."

Bac. Law-Tr. Reg. 5.

"Deflexit jam aliquantulum de spatio curriculoque consuetudo majorum"

Cic. de Amic. s. 12.

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PREFACE.

THE author of the following pages submits them to the Profession with no slight hesitation, sensible, as he fully is, how difficult the undertaking must be to throw light upon a subject which has been so often, and perhaps so much more ably elucidated. Still, however, as the principal points and leading decisions must, in the absence of any professed treatise on the subject, be sought for in the more voluminous works of our Nisi Prius writers, or the Indexes of Reports, he is induced to hope the present may not prove an altogether useless manual of easier reference. At the same time, in a great commercial nation like our own, where the interests of many persons are so deeply involved in the safe conveyance and deposit of merchandise, it cannot be unimportant to them to know in what light transactions of this nature are viewed by the Courts of Law in the present day, and what are the mutual privileges and protections afforded to each party.

4, Inner-Temple Lane, June 19, 1815.

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INTRODUCTION.

THE Law of Carriers is founded upon the most universal rules of commercial policy, and finds a place in the internal administration of almost every civilized government. Its usuages are singularly consistent in the most remote as well as the most refined states of the world. *(a)* In this country* the laws relating thereto, as they now stand, are [*2] chiefly to be deduced from what is denominated the Common Law, or those customs which have been handed down from the rudest periods, and corroborated by the practice of every succeeding age. How far the courts of judicature have promoted or diminished the commercial security,

(a) It is very remarkable, that in the system of the Hindoo laws the liability of the carrier is precisely similar in effect, and nearly so in the terms, of the common law of England; the exceptions in the former are, "that he is not liable for losses occasioned by the act of God or the King;" in the latter, "by the act of God, or the King's enemies." Colebrooke's Hindoo Law. It seems probable that the custom relating to carriers took its origin from the civil law of bailments; this species of bailment being there defined, "contractus quo aliquid gratuito gerendum committitur et accipitur." Vinnius in Comm. Justinian. lib. 3. tit. 27. 684. A similar meaning seems to have been attached to it by Bracton in lib. 3. 100. Contrahitur enim obligatio non solum scripto et verbis sed et consensu sicut in contractibus bonæ fidei ut in emptoribus conditionibus, locationibus conductionibus societatibus et *mandatis*," on the authority and application of which, vide Ld. Holt in his judgment of Coggs *v.* Bernard, 1 Ld. Raym. 919.

which our ancestors thought fit to establish, by relaxing the severity of former obligations, or how far a refinement in jurisprudence, or an advanced state of moral efficacy, warrant these invasions of the common law, are questions irrevalent to the purpose of this treatise. As we are concerned more with the practice than the theory of the existing usages, it will be more useful, and perhaps more judicious, to endeavour to explain and harmonize the system, as we find it constituted, than to canvass the propriety of alterations which depend rather on the progress of society, than any arbitrary rules of jurisprudence. The law of carriers in the present day is therefore to be considered in regard to its obligations; 1st. as originating in long-established usages, or what is called the custom of the realm; 2ndly. as regulated by positive statutes, and lastly, in what degree each of these have been effected by the acts of the several parties concerned.

The first consideration will be found to afford an extensive but easy rule of obligation, to be understood by the simplest and most incautious employ-
[*3] er, and incapable of being evaded, *or violated with impunity by the most artful hireling. The interferences of the Legislature have been principally directed to relieve the carrier in cases where human care could not extend to protect from villany, as in cases of barratry, &c. or human foresight provide security against unavoidable casualties. But the lawyer's discrimination and judgment must be chiefly directed to, and conversant with, the effect

of those undertakings by which common carriers have almost entirely divested themselves of the character of public servants, and have endeavoured to assume the privileges of special contractors; in direct violation of the policy, and in opposition to the first principles, of the common law.

To this latter consideration therefore the present inquiry will be principally directed; and as it is at the same time the most important end of the investigation, it will be the author's endeavour to distinguish the several relations in which parties may stand to each other, so as to afford a ready access to the knowledge of their several rights and remedies; and to present an orderly and succinct review of the decisions which have taken place in cases where carriers have been considered as entitled to the privileges of special contractors.

CHAPTER I.

WHO ARE CONSIDERED TO BE CARRIERS UNDER THAT TERM.

§ 1. *How far any one carrying goods, whether by Agreement or for Hire, or not.*

THE law has avowedly given the privilege of its special protection, in respect of the trader, and not the carrier. On this ground therefore it has been determined, that any person undertaking for hire to carry the goods of *all persons indifferently*, is, as to the liability imposed, to be considered a common carrier. *(a)*

No special agreement for the amount of the

(a) Gisbourn *v.* Hurst, 1 Salk. 249. Trover for goods, (taken as a distress) which had been put with the waggon into a barn. The person to whom they had been intrusted was not a common carrier, but carried cheese to London, and usually loaded back with goods, for a reasonable price, for all persons indifferently. And the Court held, "that such an undertaking to carry for hire, as to this privilege, was to be considered that of a common carrier, and the goods so delivered for that time under a legal protection, and privileged from distress for rent; and so wherever they are delivered to a person exercising any public trade or employment." Cro. Eliz. 596.

hire is essential to constitute this relation. *(b)* A carrier may demand as much as is reasonable, which the other is bound by law to pay; and the carrier cannot set up the want of such an agreement to exempt himself from the common law responsibility. "An action on the case lies upon this matter without alleging any consideration, for the negligence is the cause of the action, and not the assumpsit." Hence the obligation seems to arise more out of a public duty, than the particular consideration, and the character to be determined from the general nature of the undertaking.

§ 2. *How far one with a Special Undertaking, although not a common carrier.*

But where a person specially undertakes to carry goods, and they are injured by his neglect or mismanagement, the agreement and promise being *broken, will give a sufficient cause of action, [*6] although no person could have compelled him to

(b) Rogers *v.* Head, Cro. Jac. 262. Assumpsit against a common carrier; and upon motion in arrest of judgment, for that he was not charged as a common carrier; and that the promise was not for any certain sum, but only that he would, *rationabiliter*, content him; *non allocator*, "for the consideration is sufficient, because a carrier may demand, and the other is bound to pay, as much as is reasonable."

Bastard *v.* Bastard, 2 Show. 81. Action against a carrier for loss of a box; upon motion in arrest of judgment, because no particular sum had been agreed upon for the carriage, but only that a reasonable reward was to be paid, held well enough; for as in such case a carrier may maintain a *quantum meruit*, he is as much liable as if there is a particular agreement for a sum certain. S. P. admitted in Lovett *v* Hobbs, Id. 129. q. v. infr.

undertake the charge. *(c)* For the pretence of care, being the persuasion that induced the other to trust him, the negligence has put a fraud upon, and is a deceit to, the bailer. *(d)* In this respect the only difference between a common carrier, and a private person undertaking the carriage of goods, is, that the former is obliged to undertake the charge, which the latter is not compellable to do: the former is responsible for injuries arising out of acts against which he could not provide, a
[*7] liability at common law to which the latter is *not subject; but both are equally answerable for a misfeazance. The difference between the degrees of care demanded in the one contract and the other, is, that a common mandatary, which such a person becomes, is bound by the rule of good faith, the carrier by the unqualified rule of the

(c) Said by C. J. Rolls, in Powtuary *v.* Walton, 1 Roll. Abr. 10. (the reason of which equally applies here.) That was an action on the case against a farrier for improperly shoeing a horse; and so said by J. Paston, in Stath. Abr. tit. accion sur le cas. pl. 11. and Sir W. Jones, 61.

(d) Said by Ld. Holt, in his doctrine of bailments, Coggs *v* Bernard, 2 Ld. Raym. 919, g. v. infr. Hutton *v.* Osborn, B. R. M. 3, G. 2. MSS. cited Selw. N. P. 363. Case against carrier for losing a hare; and on demurrer, for that plaintiff not having declared on the custom of the realm, the defendant must be taken to be a private person, and so no consideration being laid, the promise was *nudum pactum;* to this it was answered, on the authority of Coggs *v.* Bernard, "That a private person who voluntarily undertakes the carriage of goods is answerable for a misfeazance, though no consideration be laid; upon the second objection, that no delivery of the hare was alleged; it was held to be implied from the statement, that the defendant had carried it part of the way, and that as the action was brought for the actual loss of the hare, the promise was only inducement."

common law. A mandatary not being by profession skillful in the business undertaken shall not be liable to an action if he performs his commission *bona fide*, and to the best of his ability. *(e)* "A mandatary, as well as a depositary, may however bind himself by a special agreement to be answerable even for casualties; but neither the one nor the other can exempt himself by any stipulation from responsibility for fraud, or its equivalent, gross neglect.

§ 3. *Hoymen, &c. whether masters or part-owners, Bargeowners, Wharfingers, or Ferrymen.*

HOYMEN, by the custom of the realm, are bound to keep and to deliver goods safely, for their hire is also due by custom: *(f)* and that too where every possible precaution has been taken to prevent the accident, or its subsequent effects. *(g)*

(e) Shiells *v.* Blackburne, 1 H. Black. R. 158, infr. Sir Wm. Jones on bailments, 54.

(f) 1 Roll. Abr. c. 2. 15. "Every thing which applies to a carrier may be advanced also of a bargemaster, or shipowner." Sir W. Jones' Law of bailments.

(g) Dale *v.* Hall, 1 Wils. 281. Case against a shipowner for damage done to goods, from a leak occasioned by a rat, although every precaution had been used the water coming in: yet held that defendant was answerable in all events, except where the goods were damaged by the act of God, or the King's enemies; for a promise to carry safely is also a promise to keep *safely*. (Vide also Goff *v.* Clinkard, there cited; where a shipmaster was held answerable for the accident, which in that case happened by his servants letting down into the ship's hold a puncheon of rum, and all possible care was used by them.) "The true reason of the principal decision is not mentioned by the reporter; it was in fact at least ordinary negligence to let a rat do such mischief in the vessel, and the Roman law has on this principle

In these persons also, every act is considered a negligence which the law does not excuse. With respect to the master, although he receives his salary from the owners, it does not effect or annul his common law liability, if he does not keep the goods delivered into his custody safely: *(h)* a rule which was first adjudged, 26 Car. 2. and it was said for the following reasons: 1st, Because he takes a reward, and the usuage is, that half wages
[*9] *are always paid him before he goes out of the country: 2d, That he may make a reserve and caution for himself: 3d, That no difference can be assigned between him and a hoyman, common carrier, or innholder: 4th, That he is rather an officer than a servant, having power to impawn the ship, and to sell *bona peritura*. In effect too his reward is paid by the merchants upon the same condition as freight is to the owners; viz. that such freight is earned, without which his wages would not be due. With respect to the owners, although in truth they do not themselves enter into the undertaking, they are yet liable, as well in respect of the freight receivable, as also

decided, that "si fullo vestimenta polienda acceperit, eaque *mures roserint*, ex locato tenetur, quia nebuit ab hac re cavere," D. 19. 2. 13. 6. Sir W. Jones' Treatise, 105.

(*h*) Mors *v.* Slue, Sir T. Ray. 220, but better reported in 1 Ventr. 190 & 238: 2 Lev. 69, and recognized in Ld. Raym. 919. Case against the master of a ship for goods delivered into his custody, and which were stolen from the ship by persons pretending themselves to be officers with a warrant to search; and held that he was answerable for the value as master, and for the reasons in the text; and because in that case he had been used to receive the freight, and to make contracts for transporting the goods.

for appointing the master, whom they may select and control; but when charged in point of contract as employers, they must all be joined. *(i)* So an action lies equally against a common bargeman, without any special agreement, *as a- [*10]
gainst a carrier upon land. *(k)* So a ferryman, if by overloading his boat any injury arise, is liable for such default or negligence; and it seems that he will only be excused where the case falls under the exception of loss by perils of the sea. So the owner of a Gravesend boat, which carries both men and goods, is a common carrier. So whereever an action on the case lies against a common land carrier, it lies also against a wharfinger, "it is

(*i*) Boson *v.* Sanford, 2 Salk. 439. 3 Lev 258, and Carth 52. Case against two of the several part-owners of a ship, and held that the action was quasi *ex contractu*, and not *ex delicto*; and judgment was given for the defendants, because all were not joined. Said also by Holt, C. J that it was at the election of the plaintiff either to bring his action against the master or the owners, as in case of mariners' wages the action lies against either master or owners; and the master or owners may maintain an action for freight. [There is no doubt that the reason why judgment was so given could not now be sustained, as such a nonjoinder must be pleaded in abatement, Rice *v.* Shute, 5 Bur. 2613, and Abbot *v.* Smith, 2 Bl. R. 947.] Fry *v.* Marsh, Lent Ass Devon. 2 W. & M. (cited Carth. 62.) Assumpsit by owner of a ship to recover freight of goods imported from Bourdeaux to Topsham, and C. J. Holt held clearly, "that the action might be brought by either master or owner."

(*k*) Rich *v.* Kneeland, Cro. Jac. 330, and Hob. 18. Case against a common bargeman for losing a portmanteau, and after judgment given against defendant, upon the issue, whether plaintiff discharged defendant of the carriage, error was brought and assigned, that the action lay not against a common bargeman without special promise; but all the justices and barons held, "that it well lies as against a common carrier upon land."

impossible to make a distinction betwen them *(l)*."
[*11] And it has lately been *determined, that the commander of a king's ship, bringing home bullion at the usual freight, is liable to an action for not carrying safely and delivering it, although this seems more upon the implied contract than from any common law liability." *(m)*

§ 4. *Stage-coachmasters—when a Price is paid for Carriage—when owner is present—Coachmen—Hackney-coachmen when.*

COACHMASTERS have been considered not to fall within the description of common carriers *(n)*;

(*l*) Said per Lord Mansfield, in Ross *v.* Johnson, 5 Bur. 2825. This was an action of trover against a wharfinger for not delivering goods which had been lost or stolen out of his possession; and held, that the clear remedy was by action on the case: for as the refusal to deliver the goods arose from their being lost, and so they could not be delivered, it was a bare omission, and no evidence of conversion to maintain trover. Bancroft's case, Att. 93. Case against a ferryman for throwing a box (of which he did not know the contents, but in reality it contained jewels,) into the sea, on a sudden storm arising on the passage; and it was resolved, that he should answer for it. "I cannot help suspecting that there was proof of culpable negligence in this case, and probably the casket was both small and light enough to have been kept longer on board than other goods." In the Gravesend barge case, the bargeman was holden not answerable for a pack thrown overboard in a tempest; but there the pack was of great value, and *great weight*, 2 Bulstr. 280." Sir W. Jones, 107.

(*m*) Hodgson *v.* Fullarton, 4 Taunt. 787.

(*n*) Middleton *v.* Fowles and another, 1 Salk. 282. Case against masters of a stage coach for the trunk of a passenger, which had been delivered to the driver and lost; and upon the question whether the master was liable, said per Holt, a stage-coachman is not within the custom as a carrier, unless such as take a distinct price for the carriage of goods as well as persons. And vide Upshare *v.* Aidee infra.

nor to be liable as such, unless where they receive a distinct price for the carriage of goods; nor can a gratuity given to the drivers bring the masters within the custom for that is not within the execution of the authority given them by their em- [*12] *ployers: *(o)* where however a coachman or driver takes money indiscriminately for carrying goods, he is for that purpose a carrier, whether the goods belong to a passenger or stranger: and he will then be in the same situation with a common carrier; so where the custom prevails of charging

(o) Lovett *v.* Hobbs, 2 Show. 127. Said at N. P. per Jones, J. "where a coachman commonly carries goods, and takes money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods are a passenger's or stranger's."

It does not appear that the direct rule laid down in the first of the above cases, nor the conclusion to be drawn in favour of the owner in the latter, have been overruled by any modern decision on the subject; although Mr. Selwyn, in his N. Pri. p. 358, seems to consider the case of Clarke *v.* Grey, 6 East. 564, and what was said per Chambre, J. in Robinson *v.* Dunmore, 2 Bos. & Pul. 419. (vide infr.) as making coach-owners in general liable as carriers. But it may perhaps be doubted whether these cases go to such a length; such a conclusion can only arise from inference; and those cases were in fact decided on very different points, although the declarations were in form, on the custom; a circumstance which may have arisen from the owners having really brought themselves within the custom in either of the ways mentioned in the text. Heavy luggage is generally refused, on the ground that the carriages provided are intended for other purposes, and that allowing luggage at all is more for the accommodation of the passengers, than a direct object of profit to the owners. In mails it is always refused; and it is no doubt competent for any other proprietor of a coach to devote it exclusively to the carriage of passengers; *quære igitur.* Where however the carriage of heavy goods, luggage, &c. is regularly allowed, and charged for, and parcels in general carried for hire, the proprietors are certainly to be considered common carriers. (H. J.)

*for overweight, it seems that the *coachmasters* become also liable; for to the extent charged for they are common carriers, and the owner of the goods being present, will neither alter the responsibility of the master as a carrier, nor on the other hand deprive him of the benefit of a public notice limiting such responsibility. *(p)* So a hackney coach-
[*14] man *(q)* is not chargeable *as a carrier for a passenger's goods unless under a special agreement, and then it is doubtful whether he ought not to be charged in respect of such agreement rather than

(*p*) Clarke *v.* Grey, 4 Esp. 177. In an action against the proprietors of the True Briton stage coach, from London to Market Harborough, to recover the value of a trunk belonging to plaintiff's wife a passenger; it was said by Lord Ellenborough "it has been decided that the luggage of passengers came within the exception," referring perhaps to Hutton and uxor *v.* Bolton, cited, 1 H. Bl. 299. in which money was allowed to be paid into court by the owner of the coach to the amount of his responsibility specified in a notice, and the plaintiff's trunk which had been lost, was admitted to be within the exception.

Robinson *v.* Dunmore, 2 Bos. & Pul. 419. In an action on a special undertaking for safe carriage of furniture (the defendant not being a common carrier, but having put himself in that situation, by his particular warranty) held that the sending plaintiff's porter with the goods did not vary the case; the defendant was charged for having specially undertaken to carry the goods safely. In this case it was said per Chambre, J. "that if a man travel in a stage coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. In that case the owner has some care of his property, since it is more for his interest that the property should not be lost than that he should have recourse to an action against the carrier."

(*q*) Upshare *v.* Aidee, Comy. 25, said, per Holt, "that a hackney coachman is not a common carrier within the custom of the realm, and cannot be charged for the loss of a passenger's goods, except where there is an express agreement, and money paid for the carriage of the goods."

on the custom. And the reason of this seems to be, that their employment is intended more for the convenience of persons than for the carriage of goods; and so are neither within the definition of a common carrier, nor the policy of the regulations instituted concerning them.

§5. *Postmasters for Bills lost—For Non-delivery of Letters—Exceptions.*

But with respect to the Postmaster general, as no analogy whatever holds between him and a carrier, so there is no other ground for rendering him liable for the loss of letters, or their contents, by the negligence of those employed by him. *(r)* He enters into no contract, either expressed or implied; receives no hire; the post-office is a branch of the public revenue and a branch of police, created by act of Parliament, each governed by different offi-

(r) Lane v. Cotton, 1 Salk. 17, and more fully in Ld. Raym. 646. Action against the postmaster general for the loss of Exchequer bills; but held by three judges against Holt. J. "That the action did not lie, 1st, because the office is created for intelligence, and not for insurance; for promotion of trade in procuring speedy dispatches, and not an absolute security for the dispatches themselves: and 2ndly, Because the offending party is himself a substantial officer, and liable for his own acts, and because from the very nature of letters being in themselves missive, and transient from hand to hand, are impossible to be secured by the postmaster himself: and that the act styling it only a *letter office* did not intend it to be considered as a mode of conveyance for *treasure*.

Whitfield v. Ld. Le Despencer & al. Cowp. 754. A similar case for recovery of the value of a bank note stolen out of a letter by one of the sorters; and decided on the authority of the preceding case, which it was said had been taken notice of, and recognised as law by the bar, the parliament, and by the public at large.

cers: and what in a common carrier would be only a breach of trust, is in them declared by statute
[*15] to be a capital *felony. As the statute provides against the particular default of the postmaster
[*16] himself, *in one case only, viz. where he fails in providing post-horses for the purpose of carrying letters he cannot be made liable to any action for a constructive negligence by others: for any default of his own he is clearly liable, but not for any negligence or misconduct of any inferior officer. These latter, offending in the business of their respective offices, would be liable civilly for any injury thereby sustained. *(s)* They are independent substantial officers, and the business of the post-office could not be executed without them. From the time of the first establishment of the post-office, during the usurpation of Cromwell, to the present day, many acts have been passed relative to its improvement, but all of them by their total silence as to any liability of the postmaster general have recognized the exemption contended

(*s*) Rowning *v.* Goodchild, 3 Wils. 443, and 2 Bl. Rep. 906. Action on the case against the deputy postmaster of Ipswich, for non-delivery of letters to the plaintiff, who has refused to pay an additional half-penny for the delivery of them at his place of abode: and it was held, that by the statute, all letters are to be delivered *gratis*, and that the action well lies against the deputy postmaster, for he has an original office, and is liable to answer for his own misconduct; and that plaintiff may sue either for the penalty of 5*l.* given by the statute for detention, or maintain an action on the case for damage sustained.

So the case of Barnes *v.* Foley, postmaster of Bath, and Stock *v.* Harris, postmaster of Gloucester, there cited, and reported in 5 Burr. 2709, in which it was agreed that what are the limits of the delivery ought to be determined by the usage of the place, and the postmaster is bound by those established limits.

for. As the point has been more than once solemnly adjudged, the public in general, and merchants in particular, by the cautions and securities which they have adopted against any losses, have shown their sense both of the liability and extent of the remedy.

But the provisions of the Post-office act would neither be complied with, nor its ends answered, if letters, when sent from London or other places, were liable to be detained at the post towns to which they are forwarded. (*t*) The statute *9 Anne, 17, therefore says, that such letters are to be *delivered* according to the several and respective [*17]

(*t*) Smith *v* Powdich, Cowp. 182. An action for money had and received by defendant, being deputy-postmaster for the town of Hungerford, as a charge over and above the usual rate of postage: and said by Lord Mansfield, "that the 4th section 5 Geo. 3, explaining *delivery* to mean delivery at every body's place of abode within the limits of delivery, means "all the district within a post-town. The section 22. 9 Ann. c. 10, as well as the usage of the post-office in London, with respect to places contiguous, lay a foundation for me to say, that there are boundaries beyond which the postmaster is not obliged, but within which he is obliged to deliver letters. The legislature does not prohibit, nor intend, that the penalties of that statute should be incurred for the carrying or re-carrying any letters to or from any town or place, to or from the next respective post-road or stage appointed for that purpose, above six miles, from the said general post-offices, or chief offices of Edinburgh or Dublin; but it appeared necessary, that if a place was four or five miles distant from a post-town or stage, that letters should be carried, and persons carrying them paid for it; my distinction does not go to the sending a letter two or three miles out of town," And. per Aston, Justice, "If it is necessary to lay any additional charge, there ought to be an application to parliament for the purpose. The postmaster cannot impose any sum. I am very well satisfied he has no right; and with respect to inconvenience, it would be of infinite and general inconvenience to the public at large, if they were obliged to fetch their letters from the post-office." This decision was expressly made upon the general question.

directions upon the same, upon pain of a penalty of 5*l.* for every offence against the tenour of the act; and if the party to whom such are directed cannot be found, they must be returned; and as by section 39 no more can be taken or paid than the rates there mentioned, it has accordingly been
[*18] *frequently determined that the postmaster cannot take any thing more than such lawful postage for carrying and delivering the letters. And although a party may sue upon the statute for the penalty, yet, as by the detention he may also suffer much more, an action on the case well lies for such consequential damages. The penalty is an accumulative security for the good conduct of the subordinate officers. The statute *(u)* authorizing the postmaster of London and Southwark to demand and take an additional penny for letters out of those divisions, without incurring the penalty, shows also the uniform sense of the Legislature as to the word *delivery*. So also the allowance by another statute of a penny on each letter delivered from on ship-board to the post-office.

§ 6. *Intermediate Carriers employed.*

CARRIERS are often necessarily employed to connect different lines of conveyance for goods by land or water, and their liability to answer to the owner for any injury to goods sustained, by negligence or accident whilst under their charge, depends on the fact of their being independent

(*u*) 4 Geo. 3. c. 34. § 16, and 5 Geo. 3. c. 15. § 4.

carriers, or only subsidiary to the undertaking of the carrier, originally contracting for the safe conveyance of the goods. There being no privity of contract between the owner and such third persons to whom the carrier originally employed *may, [*19] for the sake of convenience, or necessity, transfer them (*x*); unless the liability of such person continued, the owner would be without remedy. In that case it would also be necessary to raise as many implied contracts as there were intermediate agents, through whose hands the goods *might pass [*20] before they arrived at their destination; whereas these can in fact be considered only as servants or

(*x*) Wardell *v.* Mourillyan, 2 Esp. N. P. R. 693. Case for not delivering, according to plaintiff's direction, an anchor sent by defendant's hoy, but by him left with the wharfinger, (at the quay where the hoy usually discharged her cargo,) who had paid the defendant the freight, and given him a receipt for the goods delivered; and although it was proved, that by the custom the hoymen never troubled themselves about the goods after delivery at the wharf (except in cases of flour): it was held, "that such custom did not discharge the hoyman from his implied undertaking to deliver the goods according to the direction. The delivery to the wharfinger was not a delivery according to the direction."

Garside *v.* Trent and Mersey Navigation Company, 4 T. R. 581. Defendants undertook to carry goods from Stourport to Manchester, and to forward them thence to Stockport; and the goods in question were destroyed by an accidental fire, whilst in the defendants warehouses at Manchester, where they were to have laid until an opportunity offered of forwarding them, not for the convenience of the carrier, but of the owner of the goods: and it was held that as they were only common carriers to Manchester, and the delivery not being to be made there, the responsibility of the defendants as carriers ceased as soon as the goods were safely deposited at Manchester; their subsequent charge became merely that of warehousemen, which could not be coupled with that of carriers; and not having been guilty of laches, there could be no pretence to make the defendants liable for such an accident."

agents of the original contracting carrier. The only case in which an implied contract between the owner and such third person employed can be raised, is, where by the particular terms of the first contract the duty, and consequently the responsibility, of the carrier, terminates at a particular point: for then the delivery and receipt of the goods from the carrier to such third person is sufficient to raise an implied contract on his part to take care of, or deliver safely such goods according to the direction; and for the breach of this implied contract an action will lie against him. When, therefore, goods are transferred from the original contracting carrier, his liability continues, if such transfer is only accessory to the discharge of his own duty, or the terms of his own contract; and all such intermediate persons employed are only regarded as his agents, as porters, wharfingers, warehouse-keepers, &c. and in that case his liability continues until the goods are actually deliver-
[*21] ed *(y)*. But where *his own undertaking or duty

(*y*) Hyde *v.* Trent and Mersey Navigation Company, 5 T. R. 389. Action on the case against common carriers, for goods destroyed by accidental fire in the night, whilst in the warehouses of a person to whom the defendants allowed all the profits of cartage, &c. to the place of delivery; but from the particular circumstance of the defendants, (the original carriers,) having themselves added such charges to their own account, and received them, such acts were regarded only as a continuing transaction in discharge of their original undertaking. And although their agreement with such warehouseman to allow him those profits was not secret, or affected with any fraud, the carriers were held clearly liable until an actual delivery. And upon the general question of the liability of the carrier continuing whilst the goods are in the hands of such third persons, it was ruled by three judges against Lord Kenyon, "That the carrier was bound to deliver the

is complete and ended, and the goods have passed according to the directions out of his hands, the owner must look to such third persons for a due discharge of all the duties incident to their relative situation, as in the cases of intermediate independent carriers or shippers, receivers, wharfingers, &c. on delivery of the goods to whom, the contract on the part of the carriers is entirely determined. At what particular time the liability of these persons commences, and to what extent, will be considered hereafter.

goods to whom they were directed; as otherwise the plaintiffs might only have a remedy against a porter, or some poor person through whose hands they might have passed; and that a custom for owners to send for their goods did not dispense with the general obligation; that merely discharged the carrier from further care in that particular case. It would be of little importance to determine that carriers were liable as insurers, unless they were also bound to see that the goods were carried home to their place of destination; since as many frauds may be practised in the delivery as in the carriage of them." Vide cases, Cailiff and another *v.* Danvers, Peake, 114. Thomas et al. *v.* Day, 4 Esp. 262. infr.

CHAPTER II.

CONVEYANCE OF PERSONS.

§ 1. *Payment of Fare—When demandable.*

IF a person takes his place in a stage-coach and pays at the time only a part of the fare as a deposit, the proprietor is at liberty to fill up his place with another passenger, if the first party is not at the inn ready when the coach sets off *(a)*. But if at the time of taking his place he pays the whole fare, the proprietor cannot dispose of his place, for the passenger may take it at any stage of the journey he thinks proper, and which may be most con-
[*23] venient to him *(b)*. Where the owner *of a post-

(*a*) Said by Lord Kenyon, in Ker *v.* Mountain, 1 Esp. N. P. R. 27.

(*b*) Messiter *v.* Cooper, 4 Esp. N. P. R. 260. Action against the defendant, who kept chaises for hire, for refusing to carry the plaintiff, who had his luggage tied on, and had got into the chaise, when the owner insisted on a previous payment of the hire, which was charged exorbitantly. Plaintiff tendered him the regular hire, and the sum which had at first been agreed to be taken, but afterwards refused; and held, per Lord Ellenborough, "that, although the owner might make his own regulation, or any special contract, and insist upon his own established mode of dealing, yet, after the person was in the chaise, and tendered the money, it was too late to object to complete the journey; the owner of the chaise was bound to proceed; and if the jury found the tender, the plaintiff was entitled to recover." Verdict for plaintiff.

chaise has permitted any one to get into the chaise, and have his luggage fastened on, he cannot afterwards refuse to go the journey, if the hire be tendered him; for it is such an inception of the contract that he is bound to go through with it.

§ 2. *Where the Contract to carry ends.*

If the usual place of alighting is in the *innyard*, it has been decided, that passengers cannot be compelled to get down even at the inn-gate-way *(c)*: *a fortiori*, the proprietors are bound to carry them to the place to which they profess their coach to go, and cannot refuse to proceed at any intermediate stage: and in case of accident they would be bound to provide another conveyance; for their undertaking is absolute. So if there is a general usage to allow certain intervals for refreshment, they cannot vary at their pleasure, those usages which are perhaps a reason for preferring their conveyance to the less convenient arrangement of other proprietors. But if a coachman refuses to wait, and actually leaves a passenger behind without good cause, it seems that the latter would have a remedy, either in withholding* the remainder of [*24] the fare, or, if that has been all paid, by an action on the case for breach of the positive contract; *viz.* to convey the party to such a place at such a time; and might recover any further damage sustained by the detention.

(c) Dudley *v.* Smith, 1 Camp. N.P. R. 167. infra,

§ 3. *Luggage.*

It has been seen that a distinction was formerly drawn between stage-coach owners, and carriers strictly such, and that unless the former took upon themselves the general duties, they could not be fixed with the common law liability of the latter; and no doubt where a proprietor of a coach holds himself out to the public as only engaging for the personal conveyance of passengers, and refuses to allow his coach to be a conveyance for goods in general, the Courts would uphold the former decisions which laid down the distinction *(d.)* But, inasmuch as a distinct price is now usually made for carriage of goods, and an additional charge is imposed on all passengers for their luggage above a certain weight, it may be affirmed, that in almost every case the proprietors would be considered as falling within the description of common carriers. And however such luggage may be thought to be in some degree under the immediate care of the owner, yet it has been said, that his presence cannot ab-
[*25] solve the carrier from* his duty or responsibility, inasmuch as the care of the owner amounts only to this; that it is much more for his interest to preserve his property, than that he should be put to the trouble of suing the carrier to recover its value, which cannot be duly estimated, or the owner recompensed in pecuniary damages *(e.)* So it has

(d) Middleton *v.* Fowle and another, 1 Salk. 182. q. v. supr. Robinson *v.* Dunmore, 2 Bos. and Pull. 419.

(e) Clarke *v.* Grey, 4 Esp. N. P. R. 177.

also been decided, that when the coach owner is liable as a carrier, he is entitled also to avail himself of a general notice, limiting the extent of that responsibility; there being no difference in this respect whether the goods are the luggage of a passenger present with them, or are sent by a stranger to be carried for a distinct price.

§ 4. *Lien for Fare on Luggage.*

From the preceding liability of the proprietor necessarily arises, from the very definition of lien, a right to detain the luggage of a passenger, until satisfaction is made for the duty which has been performed: and that whether considered as an independent bailment of goods to be carried, or only accessory to the person. We shall hereafter show its existence and extent in the former case; but if the carriage of the luggage be only incidental to the agreement for conveyance of the person, although it might appear that as there had been no contract on the subject matter, there could be no right of detaining the subject out of *which no charge ari- [*26]
ses; yet both justice and policy require that this right should exist in one case as well as in the other; and as it has been decided *(f)* that a master of a ship has a lien for passage-money on the

(f) Wolf *v.* Summers, 2 Camp. N. P. R. 631. Trover against the master of a vessel, for a trunk, containing wearing apparel, and a writing desk, detained by the defendant until the remainder of the passage-money was paid him: and said, by Lawrence, J. "The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing when he is about to leave the vessel; but I think the lien does extend to other property which he may have on

luggage, as for recovery of freight; the same rule would doubtless be judicially upheld in cases of personal conveyances by land: a rule which seems to have been constantly recognised in practice.

§ 5. *Negligence—What Evidence of—When liable for—Inevitable Accident.*

The rule, that carriers shall be liable in all cases where any injury is sustained, except where it arises from the act of God or the King's enemies, does not apply to the case of carriage of persons; that regulation, being intended for the prevention of fraud or collusion, which they might be tempted, from the facilities afforded by their situation, to commit, or against which they ought to protect themselves, cannot apply to cases of this nature.
[*27] But the slightest degree of negligence* in the driver will make the principals liable; and it will be sufficient evidence to maintain such an allegation in the declaration, if the accident arose from any act of such their servant, in itself unlawful or contrary to the acknowledged custom of the road, or from rashness, or want of proper skill in driving, as in some of the following instances. If the driver, with or without the knowledge of the owners, take up more passengers than are allowed by the act of parliament, and an injury ensue, which is laid in the declaration as having arisen from such overloading, the proof of there having been an excess of number beyond what is allowed, will be conclusive

board, and in refusing to deliver them up he is not guilty of any tortious conversion.'

evidence that the accident arose from that cause *(g.)* So also if there be no excess in the number of passengers, yet if the number is actually beyond the strength of the carriage, the proprietors will be liable to an action for any damage thereby sustained *(h.)** The penalty in the former case arises [*28] from an infringement of the positive regulations of the statute: the damages in the latter, from a breach of the implied contract, that the proprietors will provide a safe and adequate carriage for the number they take up. If the driver go so close to the side of the road, that for want of sufficient room

(*g*) Israel *v.* Clark and Clinch, 4 Esp. N. P. R. 259. Action on the case, against the proprietors of the Gosport coach, for an injury received by the overturning of the coach, in consequence of the axletree having broken; and it was stated, (as in the text) by Erskine, to have been so laid down by Lord Kenyon, to which Lord Ellenborough assented. It was said also, "that the question as to the defendant's liability under the act of parliament, and for the injury sustained in the present instance, (when there were not more than the allowed number of passengers,) were quite distinct. The proprietors were bound by law to provide a sufficient carriage for the safe conveyance of the public, who travel by them, and he would expect a clear land-worthiness in the carriage itself be established."

(*h*) Christie *v.* Greggs, 2 Camp. N. P. R. 79. Case, to recover damages sustained by the breaking down of defendant's coach; and it was held, "That when the breaking down or overturning of a coach is proved, negligence in some proper precaution is always implied on the part of the owner, on whom it lay to rebut the presumption. That there was a difference between a contract to carry goods, and one to carry passengers: for the safety of the goods the carrier was liable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no farther than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. If therefore the breaking down of a coach was purely accidental, the plaintiff had no remedy for the injury he had sustained."

an accident occurs, the principals are liable.(*i*)
[*29] So if there be any danger on* the road, the driver is bound to give the passengers notice thereof, as in going under a gate-way, &c. (*k*) and he must do that to a sufficient extent, to give them an option of proceeding or not; otherwise the jury may consider it such negligence in the driver, as to make his principals liable in damages for any accident which may happen. Where however the injury appears to have arisen from unforseen accident or misfortune, the owners cannot be made responsible, although this is always matter for a jury to decide upon, and will not be presumed.(*l*) It cannot in-

(*i*) Wordsworth *v.* Willan and others, 5 Esp. N. P. R. 273. Case against defendants, (proprietors of a coach) for the negligence of their servant, in driving so near the path on the wrong side of the road, that the plaintiff's horse becoming frightened, and plunging, came in contact with the coach and broke his leg; and it was said by Rook, J "The law of the road is founded in good sense, and was matter of public convenience, but could not be carried so far, as that a carriage was in all cases bound to keep exactly to the left. He took the rule of law to be, that, if a carriage, coming in any direction, left sufficient room for any other carriage, horse, or passenger, on its proper side of the way, it was sufficient; but that it was evidence for the jury, if the accident arose from want of that sufficient room; the driver was not to make experiments."

(*k*) Dudley *v.* Smith, 1 Camp. N. P. R. 167. Case for negligence in the proprietors servant, in not informing an outside passenger of the full extent of the danger in passing under a gateway where the coach put up; and held, "that as the evidence showed it to be quite *impracticable* to pass under, it was not a sufficient warning to say only it was *awkward*; and as it was usual to carry the other passengers into the inn-yard, where indeed the journey terminated, the coach-owners continued answerable for the negligent act of their servants, until the plaintiff was set down at the usual place for passengers to alight."

(*l*) Aston *v.* Heaven and another, 2 Esp. N. P. R. 533. Case against the proprietors of the Salisbury coach for negligence; but as the accident arose from the horses having taken fright, and no fault was imput-

deed* be laid down as a certain rule, nor does public convenience require, that the driver is, under all circumstances, bound to keep on the left, or what is considered the proper, side of the road. It is sufficient, that by using previous care no injury would have arisen, unless occasioned from unforseen misfortune, notwithstanding the danger might have been avoided if the carriage had been on its own side of the road.

There is no distinction between mails and other coaches in this respect.*(m)*

able to the driver, it was held, "that the owners were not liable for the injuries which were sustained, even though the driver was on the wrong side of the road, and the accident might not have happened if he had been on the right side; for when there is no other carriage to interrupt him, the driver may go on what part of the road he thinks fit."

(*m*) White *v.* Boulton and others, Peake, N. P. R. 80. said by Lord Kenyon, "That whenever doubts might have arisen as to the liability of the postmaster-general for letters, yet when these coaches carry passengers the proprietors of them are bound to carry them safely and properly."

CHAPTER III.

CONVEYANCE OF GOODS; AND FIRST, OF THE EXTENT OF LIABILITY AT COMMON LAW.

§ 1. *How far it arises by Custom of the Realm.*

BY a delivery of goods to be conveyed for hire to any one who exercises such public employment, "the law charges the person so intrusted as responsible at all events for every injury, arising in any other way but from the act of God, or of the King's enemies;" For though the force be never so great, as if an irresistible multitude of persons should rob him, he is nevertheless chargeable. *(a)*

[*32] *And this rule, however apparently severe, is so es-

(a) Said, per Holt, J. in considering the law of bailments, in Coggs *v.* Bernard, Ld. Raym. 919. vide Dale *v.* Hall. 1 Wils. 181. sup.

Forward *v.* Pittard, 1 Term R. 27, case against a common carrier for not safely carrying and delivering goods. The goods were hops, burnt whilst in a booth under the defendant's care; and although the fire began 100 yards distant, and without any negligence whatever being proved in the defendant, it was held, "that there were events for which the carrier is liable, independant of his contract; a further degree of responsibity by the custom of the realm; for by the common law he is in the nature of an insurer; and as the fire arose from some act of man, the carrier is liable in this case, inasmuch as he is liable for *inevitable accident.*"

Hyde *v.* Trent and Mersey Navigation Company, 5 T. R. 389. sup.

tablished by the policy of the law, for the security of all persons, the necessity of whose affairs obliges them to trust those sorts of persons in the course of their dealings; for else these carriers might have an opportunity of ruining them by fraudulently combining with thieves, &c. and yet doing it in so clandestine a manner as might hardly be possible to be discovered. In support of the same rule of policy, "every thing is a negligence in the carrier or hoyman, &c. from the moment he receives the goods into his custody, which the law does not excuse; and to prevent collusive litigation, and the necessity of going into circumstances impossible to be unravelled, the law always presumes against the carrier, unless he shows the injury to have been done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, tempests, &c. And the reason why these acts only are held not to charge carriers, seems to be, that as they are not under the control of the contracting party, they ought not to affect the contract, inasmuch as he only engages against those events which by possibility and due diligence he may prevent. These rules, though said to be founded in custom, have yet always been considered to be of common law. *(b)*

*§ 2. *How far the Liability arises by reason of the Reward.* [*33]

ANOTHER reason upon which this liability is

(*b*) Said in affirming the judgment in Rich *v.* Kneeland Hob. 18.

founded, is in respect of the reward, *(c)* and not, as some seem to have thought, because he had a remedy over against the hundred. The liability
[*34] *existed at common law long before that remedy was given by the Statute of Winton; and many cases were so decided previous thereto, on the ground of the reasonable premium to which he

(c) In the time of Henry 8, it appears to have been generally holden "that a common carrier was chargeable in case of a loss by robbery only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour." Doct. & Stud. In the more commercial reign of *Eliz.* it was resolved, "that if a common carrier be robbed of the goods delivered to him, he shall answer for the value of them, for he hath his hire, and thereby implicitly undertaketh for their safe delivery." Woodlief *v.* Curteis, Hil. K. B 38 Eliz. vide sup. 1 Rol. Abr. 2. Mo. 462. Co. Litt. 89. a. and said, by Sir W. Jones, "That the reward or hire, which is considered as the reason of the decision in Woodlief *v.* Curteis, makes the carrier liable indeed for ordinary force, but cannot extend to irresistible force;" the true ground of that resolution is the public employment exercised by the carrier, and the danger of his combining with robbers, to the infinite injury of commerce, and extreme inconvenience of society." Law of Bailments, 102.

Lane *v.* Cotton, 1 Salk. 143. per Holt, C. J.

Gibbon *v.* Paynton, 4 Burr. 2299. Action on the case, against a stage-coachman, for money lost in the conveyance; but as there was an acknowledged usage, and a special notice as to the price to be paid for the carriage of money, and the plaintiff had been guilty of a fraud upon the carrier by concealing that it was money; it was held that such fraudulent concealment excused the carrier. "The true principle of a carrier's being answerable, is the reward." So, in Sir J. Tyly & al. *v.* Morrice, Carth. 485. Case against a carrier for the loss of two bags, said to contain 200*l.* whereon a per-centage had been charged for the carriage and extraordinary risk to that amount only; and held, that the carrier should answer for no more, because his particular undertaking extended no farther, and his reward was only *quoad* that sum; and "it is the reward that makes the carrier answerable, and since the plaintiffs have taken that course to defraud the carrier of his reward, they have thereby barred themselves of that remedy which is founded only on the reward."

was entitled, and which at that time served as a criterion of the extent of such liability. Hence in cases where the value of the goods delivered to him was fraudulently concealed, or misrepresented, it was considered that as his warranty and insurance were in respect of the reward, and that the reward ought to be proportioned to the risk incurred, such fraud and concealment annulled the contract altogether, and relieved the carrier.

§ 3. *How far the Liability arises by his being an Insurer.*

A CARRIER is also considered in the nature of an insurer, *(e)* wherein he differs from any other common bailee, who only engages to take the same care of the goods that he does of his own, or to use ordinary care. *(f)* The exercise of such a public employment is a tacit acknowledgment *of all the [*35] duties belonging to that character: and upon this ground of being an insurer he has been declared to be answerable even for inevitable accident.

But upon the same principle he is not compellable to incur an extraordinary hazard without a proportionate premium: "If he make a greater warranty and insurance he will take greater care, use more caution, and be at the expense of more guards or other methods of security, and therefore

(*e*) Forward *v.* Pittard, 1 T. R. 33.

(*f*) As to the degrees of responsibility of different bailees for hire in general, vide Sir W. Jones' Law of Bailments, and the judgment of C. J. Holt in Coggs *v.* Barnard.

he ought in reason and justice to have a greater reward."(g)

And as fraud, or concealment of the real extent of the risk to be run, will annul the obligation, so also if the carrier be prevented by artful misrepresentation from expressly proposing a caution against such an undertaking on his part, it will be as much a ground for exempting him against the consequences, as if he had directly inquired of the contents, and stipulated for a premium according to the declared value.

§ 4. *How far the liability arises from the Terms of his Contract, expressed or implied.*

The liability of the carrier at common law was so far simple in its maxims, and although in some cases it appeared harsh and oppressive upon an individual, yet was founded on the strongest principles of public expediency, and afforded the best rules, because the most easy to be comprehended by the
[*36] public. The one party was thereby* defended against all positive undertakings bottomed in fraud, and the other secured against the consequences of direct negligence, or equivocal honesty. But the recent innovations having in a great measure destroyed the simplicity and certainty of those regulations, and rendered the liability of the carrier in each particular case a mere question of contract, and that often of very doubtful construction, it will be proper to consider, what general obligations are

(g) Gibbon *v.* Paynton, 4 Burr. 2299. supr.

still thrown upon the carrier at common law, independent of the effect of such restrictive notices, and how far his responsibility is still to be governed by the nature of the undertaking, before we come to the construction of the particular terms which he may have imposed upon the public by such notices, and so reduced his public duty merely to the obligation of a special undertaking.

The Law has indeed always recognised the existence of a contract, *(h)* whilst it has at the same time declared the obligation of the carrier to be a public duty, by allowing the plaintiff to vary the form of his action according to the circumstances of the case, and for the greater convenience of the *party injured. But it has in all cases endeavoured [*37] to prevent the carrier from exempting himself from the responsibility attached to the character of a public servant by any self-constituted arbitrary conditions. The permitting him to be charged in contract as well as in tort is founded on a clear principle of mutual equity; that there should be a consideration adequate to the risk on the one side, and due precaution and diligence exerted on the other. A principal obligation implied will therefore in ev-

(h.) The principal cases in which it has been considered as an action arising *ex contractu* are Boson *v.* Sandford, 1 Salk. 440 & Carth. 58. Buddle *v.* Wilson, 6 Term R. 369. Powel *v.* Layton, 2 New. 369. & in Hambly *v.* Trott, Cowp. 375; those where it has been supposed to be founded in tort, Govett *v.* Radnidge, 3 East R. 63. Parry *v.* Hunwick, & Holdwin *v.* Ibbetson, cited 6 Term R. 371. Dickon *v.* Clifton, 2 Wilson. 319, and said to be in either, in Dale *v.* Hall, 1 Wills. 282.

ery case, and under every modification of the contract be, that as he is a bailee for reward, he shall be chargeable, as far as the nature of the thing puts it in his power, to perform the trust; and so far he will be liable for slight negligence in the custody and conveyance of goods committed to him.

So it will be an implied term of the contract, that he provide proper carriages or vessels, in all respects adequate to the purpose: and the law presumes a promise to that effect without any actual proof: *(i)* still however those means would be
[*38] *deemed sufficient, which, without any extraordinary accident, will probably perform the journey. *(k)*

(i) Lyon *v.* Mells; 5 East R. 428. *Assumpsit* against a lighterman for the amount of damage done to yarn by leakage; the defendants having by public notice declared that they would not be answerable for any damage unless arising from the want of ordinary care in the master or mariners, and then only as far as 10 per Cent. The Court, avoiding the question as to the validity of the notice, held, that the circumstances of the case did not bring the plaintiff's loss within such agreement. "for in every contract for carriage of goods for hire, it is a term of the contract on the part of the carrier or lighterman, that his vessel is fit and tight for the purpose or employment for which he offers and holds it forth to the public. It is the very foundation and immediate substratum of the contract that it is so; the law presumes a promise to that effect on the part of the carrier, without any actual proof, and every reason of sound policy and public convenience requires it should be so."

(k) Amies *v.* Stevens, 1 Str. 128. Case against a hoyman for damage of goods occasioned by the sinking of his hoy by a sudden gust of wind in coming through a bridge; and notwithstanding it was in evidence, that if the hoy had been in better condition, it would not have sunk with the stroke it had received, or if the defendant had been more careful, yet it was held, that although defendant might have been liable for negligence if he had ventured to shoot the bridge when the general bent of the weather was tempestuous, yet this being a sudden

So also where the general terms of his undertaking imply a delivery to the consignee, and are directed accordingly, he will not be allowed to absolve himself from that duty, by any custom which may not be mutually known.*(l)*

And he still continues liable to answer for the consequences of gross negligence or misfeazance; no stipulation can ever exempt him from this responsibility.*(m)*

gust of wind had entirely altered the case; "and no carrier is obliged to have a new carriage for every journey. It is sufficient if he provides one which, without any extraordinary accident (such as this was,) will probably perform the journey.

(l) Wardel *v.* Mourillyan, 2 Esp. N. P. R. 893. supr.

(m) Beck *v.* Evans, 16 East R. 244 & Levi *v.* Waterhouse, 1 Price Ex. C. 280 infra.

CHAPTER IV.

LIABILITY—HOW RESTRAINED BY THE ACT OF PARTIES, OR OTHERWISE.

§ 1. *By public Notices.*

WE come now to consider how far this common law liability may be restrained by a mutual contract, expressed generally on the one part, by a public notice, and implied on the other by a supposed tacit acquiescence in the terms of such notice; in which it is most material to consider how such notices are to be construed.

However just and reasonable it may be that the carrier should insure the goods at all events, without which there could be no public security, it is equally reasonable that he should in cases of extraordinary risk have the power of contracting upon extraordinary terms. If the rules of commercial policy impose upon him the responsibilities of an insurer, his reward ought, we have seen, in every case, to correspond with the greater warranty undertaken, and additional precautions necessary to be provided by him.(a) Wherever therefore the

(a) Gibbon *v.* Paynton, 4 Burr. 2301, supr.

Nicholson *v.* Willan, 5 East R. 513. Case against the proprietors of a mail, for goods which had been booked to be sent by such mail, but were carelessly sent by a heavy coach, and thereby lost; and it was

owner of the goods has been guilty of a fraudulent* representation, such fraud has been held to excuse the carrier. This fraud may be effected either by withholding the true contents when demanded, concealing it in part, or in not communicating it when the carrier has publicly given notice that he will not take charge of goods of a certain value, unless an extraordinary premium be paid for them.

The favour which the courts have always shown to carriers, in relieving them where any circumstances of a fraudulent nature have appeared, has perhaps induced the latter to limit their responsibility in all cases where the goods are beyond a certain *value: and thus the being allowed to make [*41
a special contract in some justifiable cases, has established itself into a pretence for exempting themselves from the common law liability, without an advanced price, in almost all others. For as

held, that the fact of booking the goods for a different coach, and the subsequent non-delivery, could amount to no more than a negligent discharge of duty in their character of carriers; and, per Ld. Ellenborough, "considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation, and with the allowance of courts of justice, and with the sanction also and countenance of the legislature itself, which is known to have rejected a bill for the purpose of narrowing the carrier's responsibility in certain cases, on the grounds of such a measure being unnecessary, inasmuch as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract; considering also, that there is no case to be met with in the books, in which the right of a carrier thus to limit by special contract his own responsibility, has ever been by express decision denied; we cannot do otherwise than sustain such right in the present instance, however *liable to abuse and productive of inconvenience* it may be."

there are but very few parcels, &c. in comparison, of a value below the limit which carriers have fixed as the extent of their responsibility, it will appear that, except in their being compellable to take the charge of goods as public servants, and the form of action against them grounded on such a relation, which an injured party has it still in his power to adapt according to circumstances; no part of the securities or easy remedies contemplated by the ancient common law for the greater facilities of commercial intercourse, at present remain wherever the value of the goods falls within the effect of these notices. Whilst therefore the power of fixing the additional premium on valuable goods is usurped by such arbitrary and interested parties, and the general inclination of the public to avoid subjecting themselves to extortion, and a consequent general neglect to give the notice required, continues; carriers, instead of being what they were originally intended, useful and faithful subsidiaries to public commerce, prove only arbitrary extortioners, and successful evaders of the common law policy. If the Legislature has not hitherto sufficiently interfered (of which we shall hereafter inquire,) the present system, offensive as it certainly is to the public, and injurious to commerce, can only *be [*42] remedied or removed by the adoption and legal enforcement of some gradual scale of price, proportionate to the value or bulk of the articles; and thereby control, if not altogether deprive carriers of the power they have hitherto assumed.

§ 2. *How such Notices to be construed.*

But this dereliction of public duty has not been always successfully effected, the courts having afforded every relief in their power, by construing such notices most strictly in the language, and requiring as equally strict a proof of the publicity to be given them. Whenever they have been compelled to admit the carrier to be a contracting party, they have at the same time obliged him to a strict proof of his having complied with every condition incident to such special undertaking.

Hence it has been determined that the notice in the office ought to be written in such large characters that no person delivering goods there can fail to read it without gross negligence; and that if the carrier's servant receives goods at a distance from such office, the special terms on which the proprietors take charge of them ought to be communicated by some other medium, as by public advertisements, printed hand-bills, &c. *(b)*.

(*b*) Clayton *v.* Hunt, 3 Camp. 27. Action against a carrier for the loss of a box of wearing apparel to be carried from Oxford to London, which had been delivered to a servant of the defendant, who went round the town to collect goods, &c. A printed bill was stuck up in the office where the business was trsnsacted, and cards of a similar purport had been circulated, together with advertisements, in the Oxford newspapers, but no notice was affixed on the cart, and there was no evdence that the plaintiff had ever seen any of the notices, and the carrier was held not to be discharged from his liability; upon motion for a new trial, it was refused by the Court, saying, "that the notice in the office ought to be in such large characters that no person delivering goods there can fail to read it without gross negligence; and that if a carrier's servant receives goods at a distance from the

*So also it will be intended, that whatever notice is thus circulated by his authority, will so far dispense with any notice in the office, as to afford a presumption that the statement circulated contains the whole of the limitations intended by the carrier to be put upon his common law liability. *(c)*.

So also before he will be allowed to limit that responsibility, he will be bound to take care that every one who usually employs him is *bona fide* and fully informed of the limitations to be imposed.

[*44] *For that knowledge will not be inferred, particularly where such a notice calls the attention of the public to every thing attractive, but endeavours to conceal whatever may be calculated to repel customers; as being printed in a much smaller character, &c. *(d)*.

office, the special terms on which he deals ought to be communicated through some other medium."

(*c*) Cobden *v.* Bolton, 2 Camp. 108. Case against the proprietor of a coach, to recover the value of a broach and ring sent by his coach; to meet which, evidence was given by an examined copy of a board fixed in the office, stating, that the coach-owners, &c. would not be liable for jewels, &c. however small the value, unless notice was given and paid for as such; but it was proved that in the printed had-bill circulated by the defendant, it was only said generally that "they would not be answerable for more than 5*l.* unless, &c." and, per Lord Ellenborough, "The printed papers in circulation dispensed with any necessity to attend to the notice in the office. I have a right to presume that what is circulated by his authority contains the whole of the limitations he intends to put on his common law responsibility as a carrier, and gives a full statement of the special contract into which he enters with his customers," The goods being under 5*l.* value, the loss was the only point for the Jury.

(*d*) Butler *v.* Heane, 2 Camp. 415. Case against a carrier to recover the value of a trunk, which was to have been carried from Cheltenham to London. At the latter place a board was fixed in the office,

And in all such cases the advertisements, hand-bills, &c. have been considered circumstances proper to be left to a Jury.

But on the other hand, where the terms of such a contract have been recognized by both parties, *the courts have held themselves bound to support [*45] such special undertakings. *(e)* And although it should not be strictly brought home to the plaintiff, that he had a clear certain knowledge of the defendant's terms of contract, yet where it is highly probable that he must have known them, or if he appears conscious from other circumstances of such a course of dealing, he cannot recover if he has neglected to comply therewith, or if he has in any other way concealed or misrepresented the value. *(f)*

giving the usual notice, but at the former place, where it had been delivered, the only mode of publishing this notice was by a hand-bill, stating in a large print the advantages of sending by this waggon, but the notice in a very small character at the bottom. And, per Lord Ellenborough, "This is not sufficient evidence of a special contract to limit the defendant's common law liability. The jury ought to believe that the plaintiff, or his agent, at the time of delivery, saw, or had ample means of seeing, the terms on which the defendant carries on his business. How can this be inferred from a bill nailed on the door which called the attention to every thing attractive, and concealed what was calcutated to repel customers. If a carrier is to be allowed to limit his responsibility, he must take care that every one who deals with him is fully informed of the limits to which he confines it."

(*e*) Nicholson *v.* Willan, 5 East. R. 507, supr.

(*f*) Clay *v.* Willan, 1 H. Bl. 298. The defendants were proprietors of a stage-coach, by which the plaintiff sent a quantity of light guineas, from Wakefield to London; two shillings for the carriage, and two-pence for booking, were paid at the time of delivery. But it being proved, that the person by whom the plaintiff sent the parcel to the inn, knew of the usual terms, and had not discovered the contents of the

Had carriers, by a general consent, adopted one certain approved legal form of notice, to vary their responsibility in extrordinary cases, few rules of construction would have been necessary, and few difficulties could have arisen in determining when the circumstances of any case came within those general rules of exception. As carriers have however in general adopted a peculiar form of notice, the cases have been decided in reference only to, and upon a construction of such particular notices. Hence it seldom happens that one case
[*46] affords *a parallel or precedent for another, which may arise upon a differently-worded limitation. The easiest mode therefore of comprehending their nature and effect, and deriving any certain ground of decision from them, will be by comparing the several notices upon which the courts have been hitherto called upon to decide.

In the case where the terms of the notice were, "valuable goods will not be accounted for, if lost, of more than five pounds value, unless entered as such, and one penny insurance for each pound value paid on delivery to, &c."; the court held, that the tenour of these printed conditions seemed to be, that the defendants were not liable to any extent unless the parcel had been entered and paid for as valuable; and the plaintiffs neither

parcel, nor paid for them as valuables, the plaintiff was nonsuited; and the rule for setting it aside discharged for the reasons in the text.

recovered to the extent of five pounds, nor yet the price paid for carriage and booking. *(g)*

Where the advertisement was, "that the carrier would not be answerable for any goods committed to his care above the value of twenty pounds, unless he was paid in proportion to the risk," his liabilty to that extent was held to be admitted, and he was allowed to pay that sum into court. *(h)*

Where the notice purported, "that the proprietors would not be responsible for more than five pounds, unless booked and paid for accordingly;" it was held, that the payment of that sum into *court was to be considered an admission of the [*47] contract to be liable to that extent. *(i)*

Where the general notice was, "The proprietors will not be accountable for any parcels, &c. of more value than five pounds, unless entered as such, and paid for accordingly;" it was held, that the plaintiff under the terms of such a contract was not entitled to recover any thing, the goods being above that value. *(k)*

When the notice was conceived in the following terms, "Take notice, that the proprietors, &c. at this office, will not be accountable, &c. for any goods, or any package whatever, if lost or damaged, above the value of five pounds, unless insured and paid for, &c." The court said, "they could not help giving effect to those terms in the notice,

(*g*) Clay *v.* Willan, 1 H. Bl. 298. Vide also Hutton & ux. *v.* Bolton, there cited, & supr.

(*h*) Yate *v.* Willan, 2 East. R. 128, infr.

(*i*) Izett *v.* Mountain, 4 East. R. 371.

(*k*) Nicholson and another, *v.* Willan and another, 5 East. 507, supr.

by which, inasmuch as the goods in question were above the value of five pounds, and not insured, or paid for at the time of the delivery, the defendants could not be held accountable *at all.*" And the verdict even for five pounds was set aside, and a nonsuit entered. *(l)* But

Where the terms of the notice were, "Take notice, that no more than five pounds will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for ac-
[*48] cordingly," the plaintiff was allowed to retain *his verdict for five pounds, as a limited amount of damages recoverable by him under the conditions of this contract.

From the strict construction put by the courts on these several notices, it appears, that whilst they have endeavoured to uphold the common law liability of the carrier, they have yet given efficacy to the limitations of such contracts, whenever they could fairly be set up, and appear to have been recognised and acted upon by each party.

§ 3. *When Notices waived.*

THERE are some instances where the subsequent conduct of the carrier has been considered to be a waiver of those conditions by which he has endeavoured to limit the extent of his responsibility; as,

When he carries the goods beyond the place to which they were consigned, and when he might,

(*l*) Clarke *v.* Grey and others, 6 East. 564, supr. 2 Smith 622.

and, by the implied conditions of delivery, ought to have delivered them; and the loss accrues during such ulterior conveyance, and so out of the line of the original undertaking.(*m*) *So also upon [*49] the principle by which these notices have been supported; *viz.* that the carrier shall not incur a risk, with the extent of which he is not fully acquainted, a notice has been held not to protect the carrier in cases where that principle cannot apply.

The notice, although in its terms made, and perhaps meant, to extend to every description of goods, cannot be indefinite, but must, it is said, be construed only with reference to the subject matter, and applied to such cases only, where the party undertaking has no other means of knowing of what nature or value the goods may be, but that which the law of contract affords him, in requiring a *bona fide* representation to be made at the time of delivery. When therefore the bulk, or evident quality of the goods, sufficiently notifies the value, and corresponding risk, it is clear, and has been

(*m*) Ellis *v.* Turner, 1 T. R. 531. Action on the case, to recover for goods damaged by the non-delivery at the place to which the master of the vessel had expressly undertaken to leave them. The vessel traded from Hull to Gainsborough, and took in lading for Stockwith, an intermediate place, which was the place of delivery in the principal case: the vessel reached Stockwith in safety, and might have delivered the plaintiff's goods there, but the master of the vessel finding it inconvenient, did not deliver the whole, but proceeded with the rest in the vessel, on her voyage, which sunk before her arrival at Gainsborough; it was held, "that, having had an opportunity of delivering the goods in safety, the defendants were, at all events, liable. And, although the loss happened in consequence of the misconduct of the defendant's servant, the superiors are answerable for it upon their contract."

decided, that the principle of exemption cannot apply. *(n)*

[*50] *Hence the distinction has been drawn, that where the value is obvious, carriers are not exempted from their common law liability by the consignor's neglect to comply with the terms of any notice. The carrier on receiving the goods being aware of the risk, may and ought to make his demand of extra premium; and the not doing so is a waiver

[*51] *of the condition reserved of making an extra charge on such goods. And there is little doubt,

(*n*) Beck *v.* Evans, 16 East R. 244, and 3 Camp. 267. Action on the case, against defendants, common carriers, for so negligently carrying a cask of brandy, that the greater part was lost. It appeared, that the waggoner was informed of the cask leaking, but never took any step to prevent it, although he stopped several hours at Birmingham, and other places, and only took the cask out when he had other parcels to deliver. The principal ground of defence was, a notice in these terms, "The proprietors of the London and Salop waggons, give this public notice, that they will not be answerable for cash, &c. &c. or *any other goods, of what nature or kind soever*, above the value of five pounds, if lost, stolen, or damaged, unless a special agreement is made, and an adequate premium paid, over and above the common carriage, &c." And it was said, per Le Blanc, J. "The exemption of carriers from general liability, by reason of notices of this sort, has been carried to the utmost extent, and cannot be supported on any other ground than this, that they shall not be held liable to a large amount when they only get a small reward for the carriage. They are therefore exempted from liability, when the goods are of a much larger value than, from a knowledge of their bulk or quality, they could probably guess them to be. But that cannot apply to goods of a large bulk and known quality, where the value must be obvious." Upon the other ground of a mis-direction, that the carrier cannot stipulate for exemption from the consequences of his own misfeazance, it was said, per Lord Ellenborough, "If goods are confided to him, and it is proved that he has misconducted himself, in not performing a duty which, by his servant, he was bound to perform, that is such a misfeazance as, if the goods thereby become damaged, his notice will not protect him from."

Sed. vid. Levi *v.* Waterhouse, 1 Price Ex. C. 280, Appendix.

that the great price usually paid for the carriage of such bulky goods would always be considered to include an extraordinary premium, proportionate to the greater care necessary to be used, and risk to be encountered.

So the words *glass*, &c. *(o)* written on any package, has been deemed a sufficient notification of the risk, and throws the burthen on the carrier of showing a demand made of an extra price, as a condition precedent to his undertaking the charge; or the neglect to make such demand will be considered a waiver of any further condition to be performed by the consignor, as agent of and for the person bringing the action.

But where a carrier might protect himself by a continuing notice, *(p)* his having neglected so to

(*o*) Wilson *v.* Freeman, 3 Camp. 527. Action against a carrier, for negligence in conveying a looking-glass. The packing-case was marked *glass*; and, on delivering it, the book-keeper was informed of its value and desired to charge what he pleased for it, but only sixpence booking was paid. And the defence was, that the notice required such articles to be paid for as such when delivered; but held, "that, as the book-keeper knew the value, and was desired to charge what he pleased, the payment of the money was dispensed with, and the notice was unavailing."

(*p*) Evans and another *v.* Soule, 2 Maule & Selw. 1. Case against a carrier by water, from Bristol to Worcester, for negligently carrying sugar; the vessel having suddenly sprung a leak, whereby she sunk, without any negligence of the defendant or his servants; and held, that a notice (advertising the Public, that goods shipped on board their vessels, continued at the risk of the owners, unless the loss or damage should arise from the actual default of the master, or mariners, employed by them,) was still operative, whilst it continued hanging up in the office; and did not estop him in future, although he might on former occasions have carelessly settled accounts, making an allowance for damage, or when he might think that some negligence had taken place.

do in some instances, will not be considered a general waiver of a special acceptance.

[*52] *§ 4. *By Statute for relief of Water Carriers.*

As water carriers are equally liable with land carriers for every loss by robbery or otherwise, *(q)* their responsibility would be much more extensive, and risk more hazardous, from the greater facility which their particular situation affords for treache-
[*53] ry and fraud in the persons they necessarily *em-ploy, if they were liable absolutely, and to the full extent of the value of the goods. Independent of this consideration, they have no remedy against the acts of pirates, &c. as land carriers have against those of robbers, by an action against the hundred. But inasmuch as they have the choice and appointment of their servants, they ought in some degree to be accountable for their conduct, and to the extent which they themselves have trusted these per-

(q) Proprietors of the Trent Navigation Co. v. Wood, 3 Esp. N. P. R. 127. To recover damages for goods of defendants, undertaken by Plaintiffs to be carried from Hull to Gainsborough, the vessel being sunk by striking against an anchor in the river, to which no buoy had been fixed to give notice of the danger. And it was held, "that there being no case which made any distinction between a land and water carrier, and this injury arising from the negligence of a private man, if this sort of negligence were to excuse the carrier, whenever he finds that an accident has happened to goods, from the misconduct of a third person, he would give himself no farther trouble about the recovery of them; and, although this might be a sea voyage, and it was usual to insure, the merchant is not bound to insure, nor does that vary the obligation."

sons with; *(r)* a degree of responsibility, which it is supposed may insure to their bailors that ordinary care which a prudent man would take in choosing his servants.

*The stat. 7 Geo. II. enlarged by 26 Geo. III. c. 86, therefore enacts, "That the owners shall not be liable for more than the value of the ship and freight, in any case of loss arising from the fraud, embezzlement, or treachery, of the master or mariners." *(s)* [*54]

(r) The 1st section of 26 Geo. III. c. 86, enacts, "That no person or persons, who is, are, or shall be owner or owners of any ship or vessel, shall be subject or liable to answer for, or make good, to any one or more person or persons, any loss or damage by reason of any embezzlement, secreting, or making away with, by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandise, which, from and after the day, &c. shall be shipped, taken in, or put on board any ship or vessel, beyond the value of the ship and freight; or for any act, matter or thing, damage or forfeiture, done, occasioned, or incurred from and after the said &c. by the said master or mariners, or any of them, without the privity or knowledge of such owner or owners, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due, or to grow due, for and during the voyage." Such value to be discovered by a bill in equity, and to be distributed to the freighters in proportion to their respective losses or damages. And by § 2, it is declared, "That the owners shall not be liable to answer for loss or damage, occasioned by fire on board the ship." And by § 3. "That they shall not be liable to answer for loss or damage, happening to any gold, silver, diamonds, jewels, watches, or precious stones, which may have been shipped on board, by reason of robbery, embezzlement, &c. unless the shipper thereof insert in his bill of lading, or otherwise declare in writing to the master, &c. the true nature, quality, and value of such articles."

(s) Sutton *v.* Mitchell, 1 Term R. 18. Action against the owner of a ship, to recover the value of a quantity of dollars, which were taken, by force, from on board by fresh-water pirates, whilst at anchor in the Thames. Evidence was offered, that one of the mariners was accessory to the robbery, by giving information: and held, that, though in

order to exculpate the owner, it should appear, that one of the mariners was actually concerned in the robbery, yet that the words of the act are large enough to take in this matter. "The act is as strong as possible, and was meant to protect the owner against all *treachery in the master or mariners*; it meant to relieve the owners of ships from hardships, and to encourage them at the same time, saying, that so far as you have trusted the master and mariners yourself, so far you shall be answerable, which is to the value of the ship and freight."

CHAPTER V.

WHAT ACTS SHALL BE A DISCHARGE OF THIS LIABILITY.

§ 1. *Parties own Acts.*

WE have seen that the real ground of contract is founded on a reward or consideration proportionable to the risk and duty to be performed. *(a)* An essential part of the contract is therefore a *bona fide* communication of the charge to be undertaken; that the carrier may be properly apprized of the extent of the duty imposed upon him. Upon the principle therefore, *ex dolo malo non oritur actio*, a party cannot recover where the carrier has been deceived by him; the liability is determined, and the party is deprived by the fraud of that remedy, which is said to be founded in the reward. *(b)*

So where the loss is occasioned by circumstances which lie in the care and cognizance of the owner, and not of the carrier, no action can be maintained against the latter; *(c)* for such duty is in the nature of a condition precedent.

(*a*) Gibbon *v.* Paynton, 4 Burr. 2299. supr. and the cases there cited.

(*b*) Tyly *v.* Morrice, Carth. 485, supr.

(*c*) Whalley *v.* Wray, 3 Esp. N. P. R. 74. *Assumpsit* against a lighterman for damage done to rice by not being duly landed; but it appearing, that previous to its being landed it was necessary to obtain a permission from the custom-house; held, 'that as the obtaining such permit was no part of the lighterman's duty, but rather of the plaintiff's custom-house agent; the plaintiff could not rely on the general liabil-

So if the contract was made under such circumstances, existing at the time, as must necessarily be taken to have included a tacit stipulation that the party should not be considered a common carrier, without which no reasonable man would have undertaken for the conveyance, he cannot be made liable in that character.(d)*

§ 2. *Act of God.*

As the law charges no one with default where the act is compulsory, so that there cannot be a [*57] *consent and election. The act of God therefore, for which a carrier is excused, has been defined by Lord Mansfield to be "a natural necessity, and to arise *inevitably*, as winds, storms, *(e)* a sudden gust of wind, *(f)* &c. It means something in op-

ity of the defendant, without proving that it was his duty to have done that from the neglect of which the loss had arisen."

(*d*.) Edwards and others *v.* Sherratt. 1 East 604. Case against a common water-carrier for so negligently carrying wheat that it was seized by a mob during riots. But as the defendant had been prevailed upon to send it by a private boat, and not in his usual course of carriage, at the express request of the plaintiffs, the court held, that it was a question of fact for the jury to find, if the corn had been put on board, according to the usual course of dealing, with a common carrier: and the jury having found that this was not a transaction in the common course of trade; it was to be considered as a charge received under such circumstances, that if the defendant had been apprized of them, it is clear he would not have contracted to receive them as a common carrier; and that there was a tacit stipulation that he should not be answerable for any damage which might arise from the mob; without which no reasonable man would have undertaken for the carriage of the goods. So "where things are deposited through necessity, on any sudden emergence, as a fire, or a shipwreck, I can hardly persuade myself that more than perfect good faith is demanded in this case." Sir W. Jones, 48.

(*e*) Said by Ld. Mansfield, in Proprietors of Trent Navigation Company *v.* Wood, 3 Esp. 131

(*f*) Amies *v.* Stevens, 1 Strange 128.

position to the act of man; for every thing may be said to be the act of God which acts by his permission, every thing by his knowledge." To prevent litigation the law presumes against a carrier in every case, except such act as could not happen by the intervention of human means. And thus he has been held liable where the injury arose from a fire which raged with inextinguishable fury, and originated at a distance from the carrier's premises. *(g)*

§ 3. *Act of the King's Enemies.*

As this exception *(h)* is derived from the principle that in that particular case the carrier can* have [*58] no remedy by action against the hundred, it includes under that term only those *foreign* enemies of the king, which are such by open declaration of war, and not such domestic enemies as are considered so, by reason of any temporary insurrection or riot. In which cases, as the county or hundred are responsible for not preserving the peace, the carrier might recover under the statutes against them for losses occasioned thereby.

(*g*) Forward *v.* Pittard, 1 Term R. 33. Supr. and Hyde *v.* Trent and Mersey Navigation Comp. 5 Term. 389.

(*h*) Proprietors of Trent Navigation Co. *v.* Wood, 3 Esp. N. P R. 131, supr. and said, by Ld. Mansfield, "the case of a robber is certainly very strong, but not a natural necessity, and in this case there is an injury by a private man, within the reason of the instance of the robbery."

"A carrier is regularly answerable for neglect, but not regularly for damage occasioned by the attacks of *ruffians*, any more than for *hostile* violence or unavoidable *misfortune*; but the great maxims of policy and good government make it necessary to except from this rule the case of robbery, lest confederacy should be formed between carriers and desperate villians, with little or no chance of detection." Sir W. Jones on Bailments, 104.

CHAPTER VI.

MISCELLANEOUS DUTIES CONNECTED WITH THIS CONTRACT.

§. 1. *Refusal to carry Goods.*

BUT however the carrier may have succeeded in limiting his common law liability, by becoming a special contractor, there is no doubt but that he is still to be considered in the light of a public servant, and as such, is liable to an action for refusing to take charge of goods, if the hire be tendered him, and he has convenience to carry the same. *(a)*

(*a*) "If he would, per case, refuse to carry goods, unless promise were made unto him that he shall not be charged for no misdemeanour that should be in him, the promise were void; for it were against reason and good manners." Doct. and Stud. 270, and Noy 92.

Jackson *v.* Rogers, 2 Show. 327. Case against defendant, a common carrier, for refusing to carry a pack, though offered his hire, and held, by the Lord Jefferies, "that the action is maintainable as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same." Note. It was alleged and proved, that he had convenience to carry the same, and the plaintiff had a verdict.

Lovett *v.* Hobbs, 2 Show. R. 127. Action against a coach-master for refusal to carry goods: But evidence being given that the coach was full, wherefore the defendant denied to take charge of the goods, it was agreed to be a good answer; "for if an hostler refuses a guest, his house being full, and yet the party says he will shift, &c.; if he be robbed, the hostler is discharged." Doct. and Stud. 138, which fact being left to the Jury, there was a verdict for the defendant.

*§ 2. *What shall be considered a delivery* TO *a Carrier.*

IT is clear that where a party refuses to place any confidence or trust in the carrier, as by sending his servant with the goods: there being no bailment of them to the carrier, they never can be considered to have been in his possession, so as to charge him as a general servant or a special bailee, *(b)* and no duty can consequently arise. He may however undertake specially for their safe delivery, and such contract will be equally binding upon him with his public duty.

As it is the possession of the goods which raises the duty, it will be necessary in all cases to prove that the goods came to his possession, and for the purpose of such duty being employed concerning them. Thus, where the goods are left for a carrier in an inn-yard, or warehouse, at which other carriers put up, it will not be considered a delivery, *so as to charge him without a special notice [*61] of their being so delivered, or some previous instructions to that effect. *(c)*

(*b*) East India Co. *v.* Pullen, 1 Stra. 690. Action against a common lighterman on the Thames; but held per C. J. Raymond, "that the usage of the company to place an officer, called a guardian, in the lighter, altered it from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself; he thought therefore the action not maintainable;" so the plaintiffs were nonsuited. Robinson *v.* Dunmore, 2 Bos. and Pul 416. supr.

(*c*) Selway *v.* Holloway, 1 Ld. Raym. 46, arose out of another action on a contract to pay for hops on delivery of them to the present de-

So in order to charge a particular carrier, some proof will be necessary that the goods were received by an authorized agent on his behalf, *and that he is in the exercise of such public employment.

[*62]

If the owners of a ship have chartered it to a third person, the captain must for that voyage, be taken to be the agent of the latter for goods delivered to him; *(d)* and the owners cannot, *hac*

fendant, a common carrier, and a verdict was twice found for that plaintiff. The hops had been lodged in the inn-yard, and no acknowledgement was shown of their receipt by any servant of the defendant; but it was proved that there were many other carriers who used the same inn. And the Court said; "they were all of opinion that the hops could not be said to be delivered to Holloway."

Buckman *v.* Levi, 3 Camp. N. P. R. 414. Action for goods sold and delivered. The goods (chairs) had been sent (as at other times) to a wharf, and such had been sometimes booked, sometimes not. The plaintiff's servant took them to the wharf, and left them on the premises there piled up among other goods, with a direction to the defendant, but had no receipt for them, nor was any entry respecting them made in the warfinger's books; he had no conversation with the wharfinger, or any other person upon the premises, but only saw a person on the wharf, whom he believed to be a servant of the wharfinger. Lord Ellenborough, "A due delivery of goods to a carrier or wharfinger, with due care and diligence, is sufficient to charge the purchaser. Before the purchaser can be charged in the present instance, he must be put in a situation to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs; they were not booked, and no person belonging to the wharf is fixed with a privity for their being left there; the defendant therefore is not furnished with a remedy over against the wharfinger, and is not himself liable as purchaser of the goods."

(d) James *v.* Jones, 3 Esp. N. P. R. 27. Case against the owners of a ship for not delivering goods shipped on board, but held by Lord Kenyon, that, "although the defendants were owners, yet no express contract being proved with them, and the ship having been in fact chartered for that voyage by them to other persons, those persons were for that voyage to be deemed as the owners, and the captain as

vice, be made liable for his acts; but where goods sent to a wharfinger are by him delivered to and received by the mate of the ship, it will be a good delivery to charge the ship-owners, though the goods are lost before actually placed on board. By such delivery, the wharfinger's responsibility being determined, the obligation of the owner *eo instanti* arises. *(e)*

*Where the carriage is by means of the post- [*63]
office, it will not be a sufficient delivery to make the consignee liable for the loss, if the letter was only given to a bell-man; *(f)* but it is otherwise of a servant usually employed by a carrier to receive or fetch goods to be carried.

their agent *pro hac vice*, the liability being shifted by the charter party from one party to the other.

(*e*) Cobban *v.* Downe, 5 Esp. N. P. R. 41. Action against a wharfinger for the loss of a truss, which was to be forwarded coastwise, and said, per Ld. Ellenborough, "The duty of a wharfinger is to be measured by the usage and practice of others in similar situations, or his known and professed liability. It being proved, by established usage, that the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them, from which time it has been considered that their responsibility is at an end; undoubtedly, where the responsibility of the ship begins, that of the wharfinger ends; the mate is such a recognized officer on board the ship that delivery to him is a good delivery; if the jury believe that the mate received the goods, they are therefore in his care; and if they were once well delivered to the mate, their being lost on the wharf cannot affect the wharfinger." Verdict for defendant

(*f*) Hawkins *v.* Rutt, Peake's N. P Cases, 186. "If the creditor desire his debtor to remit a bill by the post, the delivery of the letter to a bell-man in the street, and not at a regular receiving-house, is not a compliance with the directions of the creditor; and in case of its miscarriage when so delivered, the loss will fall on the person so improperly sending it."

§ 3. *What shall be considered a delivery* FROM *a Carrier.*

But it would be of little importance to determine that carriers are liable as insurers, or on any other ground unless they were also bound to see that the goods are carried to their place of destination, since as many frauds might be practised in the delivery as in the carriage of them. It has therefore been held, from a very early period, that carriers are bound to deliver, as well as carry, goods: and, even if they were not so bound by any general course of trade, they would un-
[*64] doubtedly be bound to give notice of the *arrival of the goods to the persons to whom they are consigned. (*g*) Hence it will be considered a gross negligence wherever damage is occasioned by the goods lying in their warehouses, whether

(*g*) Golden v. Manning and Peyton, 3 Wils. 129, and 2 Bl. R. 916. Case against common carriers, for not delivering a box containing silks, which came to their warehouse without any legible direction upon it, and remained there for the space of a year, during which time they became considerably damaged, and for which satisfaction was refused. It was said, "That as the defendants hired a porter to carry out parcels, at a stated salary by the week, and to receive the porterage of such goods, the defendants engaged, and specially undertook, (in this particular case) to deliver the goods by that porter." And, upon the general question, it was said, "There can be no doubt but carriers are obliged to send notice to persons to whom goods are directed, of the arrival of those goods, within a reasonable time, and must take care that the goods be delivered to the right person. It was by the negligence of the defendants that the direction of the box was obliterated." Verdict for the plaintiff. So Allen, 93, and 7.

they receive the porterage to their own use, or not. *(h)*

*So the known usage of a hoyman, to ply to a particular wharf, will not exempt him from this obligation, nor will the delivery of the goods at that wharf be a discharge of his duty. *(i)* This rule can only however extend to cases where hoyman are common carriers, within the custom of the [*65]

(*h*) Said by J. Buller, in Hyde *v.* Trent and Mersey Navig. Company, 5 Term R. 389, Ashhurst and Grose, Js. concurring; "According to the argument, from the inconvenience, that carriers are not bound to deliver goods, I think the same argument tends to establish a much greater inconvenience, the necessity of three contracts, in all cases where goods are sent by a coach or waggon; one with the carrier, another with the inn-keeper, and a third with the porter. But, in fact, there is but one contract: there is nothing like any contract, or even communication, between any other person than the owner of the goods and the carrier; the carrier is bound to deliver the goods, and the person who actually delivers them acts as the servant of the carrier. If the inn-keeper has some interest in the concern, then he is liable as a carrier. It has been said, too, that the place of a porter is valuable, and the subject of a purchase; but who sells it? Not the person to whom the goods are sent, but the carrier, or the inn-keeper, whom I consider as the same person. If the inn-keeper has no share in the profits, then he is the servant of the carrier, as well as the porter. Therefore, whether there be the inn-keeper and the porter, or the porter only, the carrier is liable in all cases where the goods are lost, after they get into the hands of the inn-keeper, or porter because they are delivered to those persons with the consent, and as the servants of the carrier. The different proprietors may divide the profits among themselves, in any way they choose; but they cannot, by their own agreement with each other, exonerate themselves from their liability to the owner of the goods. They may fill the two different characters of warehousemen and carriers, at *different* times, but I deny that they can be both warehousemen and carriers at the same instant. If the undertaking was to carry and deliver, then the goods remain in their custody, as carriers, the whole time."

(*i*) Wardell *v.* Mourillyan, 2 Esp. 693, supr. Cobban and another *v.* Downe, 5 Esp. 41, supr.

realm, and not acting under the terms of a bill of lading, where the place of delivery is more particularly specified. Thus in the case of goods brought by ships from foreign countries, the bill of lading is merely a special undertaking to carry from port to port: according therefore to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the owners.*(k)* In the river Thames, the liability of the master by the custom continues whilst the goods are delivering into a lighter, sent by the consignee to receive them, until the loading is completed.*(l)*

When the ship-owner or master cannot deliver the goods, from their being wrongfully detained by
[*67] revenue-officers, his liability nevertheless* continues, *(m)* inasmuch as he has a remedy over against the officers for such illegal detention.

(k) Hyde *v.* Trent and Mersey Navigation Co. 5 T. R. 389 supr.

(l) Catley *v.* Wintringham, Peake, Cas. N. P. 140. *Assumpsit* against the master of a ship, for not safely conveying and delivering a quantity if tallow to the plaintiffs, in London, who where the consignees. The plaintiffs had sent a lighter to fetch the tallow from the ship, which had arrived in the Thames. Whilst the lighter was left lashed to the ship, with part of the tallow on board, it was cut from the ship, and part of the tallow stolen thereout: and, although the defendant had told the lighterman, that he had not hands enough to guard the lighter, (to which no answer was returned,) it was said, per Lord Kenyon "The custom of the river must undoubtedly govern the parties. There might have been a special contract, limiting the defendant's duty, but he could not do that by any act of his own, without the consent of the other party." Vid. also Strong *v.* Natally, 1 Bos. and Pul. N. P. 16.

(m) Gosling *v.* Higgins, 1 Camp. 451. Action against the owner of a vessel, for non-delivery of ten pipes of wine, shipped at Madeira, to be carried to Jamaica and thence to England. The ship was detained at Jamaica, for a supposed violation of the revenue laws, but on appeal, the sentence of condemnation was reversed, and it was said, per Lord Ellenborough, "You have an action against the officers

If a carrier delivers goods to a wrong person, though by mistake, he thereby becomes an actor, and is guilty of a conversion for which trover will lie.*(n)*

So if the party gives express orders to a carrier not to land goods on a wharf, which was agreed to at the time, but the ship-master afterwards disobeys those orders, and delivers the goods into the possession of the wharfinger, whereby an extra charge is incurred, and the goods are detained until that is satisfied, it is evidence of a tortious conversion in the master.

§ 4. *When his Duty commences,—when determined.*

HAVING seen when the carrier may be said to have possession of the goods, and when no longer to have any control over them, it follows, that his *liability for their safety attaches immediately upon [68*] such delivery, *(o)* and continues, until and termi-

The shipper can only look to the owner or master of the ship." Verdict for plaintiff. Vid. Abbot on Shipping, part III. ch. iv.

(n) Youl *v.* Harbottle, Peake, Cas. N. P. 49. Syeds *v.* Hay, 4, Term R, 260, and Ross *v.* Johnson, 5 Burr. 2825, infr.

(o) Thomas and another *v.* Day, 4 Esp. N. P R. 262. Action against a warehouseman, for damage done to two packs of linen, by the cords breaking, whilst being lifted from the cartman's cart, and said by Lord Ellenborough, "That, until the goods were delivered to the warehouseman the cartman was to be considered as the agent of the person sending them; but when the warehouseman took them into his own hands, the moment he applied his tackle to them, from that moment the cartman's liability determined. The damaged packs, being lifted by the crane, were then in his possession; and, although the defendant offered the use of slings, which the cartman declined, that will not exempt the warehouseman; he ought to have insisted on the cartman's using them, and if he refused, to have repudiated the goods, and refused to accept them;

nates only when the property is vested in the hands of the consignee, by actual delivery, or the property is resumed by the consignor, in pursuance of his right of stopping them *in transitu*, for then only the possesion of the carrier ceases. For which purpose, as the parties themselves intend, so the law contemplates no other bailment, than that between the owners or parties interested, and the original carrier. The porters, servants, wharehouse-receivers, &c. are considered as no other than the carrier's servants, employed by him in execution of the principal undertaking. And although such persons usually make a separate charge for their particular
[*69] *trouble in booking, &c. (which appears to be an advantage rather to the party than the carrier, as it affords an easier proof of delivery,) this does not at all vary the case; although for gross negligence, *(p)* &c. an action might also lie against the individual by whose misfeasance the damage was occasioned. A contrary decision indeed would be highly inconvenient to the public, and open a door to fraud. For, if the principal carrier's liability ceased when he had brought the goods to any inn, &c. where he might choose to put up his carriage, and such goods were lost before they were delivered to the owner, the latter might only have a remedy against a common porter, or person of no substance, whose name he never heard of, and

I think he is liable for the loss in point of law." Cobban *v.* Downe, 5 Esp. N, P. R. 43, supr.

(*p*) Hyde *v.* Trent and Mersey Navigation Company, 5 Term. R. 389, supr.

against whom there could be no substantial remedy. As therefore carriers ought to be answerable for the persons whom they appoint, or allow to receive or deliver out goods brought by them; so no agreement between these parties can or ought to affect third persons, who are ignorant of the terms, or even parties, into whose hands their property, by such agreement, may pass. Still less can the carriers, by any such agreement, exonerate themselves from a common law liability to the owner, in case of undue delivery, or other injuries occasioned by the default of such their servants.

* § 5. *Lien for Hire.* [*70]

It is laid down as a general rule, that wherever any one is obliged to receive goods, to perform any duty on them, he has a lien on them at common law. For as that imposes the burthen, it also gives him the power of retaining for his indemnity.(q)

(q) Skinner *v.* Upshaw, Lord Raym. 752 Trover against a carrier for detaining goods; but it being in evidence, that the defendant offered to deliver the goods on payment of his hire, it was ruled, per Holt, Ch. J. That the carrier may retain the goods for his hire. Verdict for defendant accordingly.

Oppenheim *v.* Russell, 3 Bos. and Pull 42. Trover for goods, which the defendant, a carrier, claimed to retain, as a lien for a general balance due from the consignee, by a particular usage, against the consignor, who had exercised his right to stop the goods *in transitu*; the consignees having become bankrupt, and the price of the carriage of the goods in question been tendered; it was, there held, "That the delivery to a carrier is a constructive or fictitious delivery to the consignee, to whom he has undertaken to deliver them. But this fiction can never be carried so far as to deprive the consignor of his right to resume them, if stopped before they have actually got to the possession of an insolvent consignee: and this, though a just and equitable right, is a legal right

But, although a carrier is bound to carry goods by the custom of the realm, for a reasonable reward to be therefore paid him, and has consequently a lien on them, yet that extends only for the carriage price of the particular goods on which the hire is due; any further lien, on a general balance, must be founded on a general usage of trade, or on a particular contract to that effect, between the parties.

[*71] *To justify so extensive a claim upon the ground of general usage, the courts will require evidence of instances, ancient, numerous, and important, before they will alter the common law situation of carriers.(r) No usage of particular individuals

too, The claim set up by the defendant is founded on a special agreement; not on general principles of justice, but on particular usages But it is nothing more than a special contract between the carrier and the consignee, and how is that to interfere with the legal right allowed to the consignor of stopping *in transitu*? If this right in the carrier is allowed to be good, he must derive it from the consignee; he cannot himself have a greater right than the consignee has; he cannot therefore, by any agreement between a particular set of carriers and consignees of goods, put an end to a right rested in the consignors before that agreement existed. And as neither the consignee nor his assignee could defeat the rights of the consignor, so neither can the carrier, who comes in under the consignee, defeat that right." Verdict for plaintiff.

(r) Said in Aspinall, assignee of Howarth, *v.* Pickford, *ibid. note.*— Trover for goods, by the assignees of consignee, against a carrier, who claimed to retain for a general balance; and this right was established by evidence of its having been before claimed and allowed, and also by evidence of a general usage by other carriers.

But in Rushforth and others, *v.* Hadfield, 6 Term R. 519, Trover, by assignees in a similar case; it was held, "That such a lien for carriers does not exist at common law. To alter their common law situation, it must be shown that both parties have consented to the alteration; the carrier cannot alter his own situation by his own act alone. This must be by contract between them; and usage of trade is evidence of such a contract. And where such a usage is general, and has been long established, it is fair to conclude, that the particular

*will therefore be sufficient to bind other parties, unless it were so general a practice as to furnish an inference, that the party must have had knowledge *of it, and to warrant a conclusion, that he [*72]

parties contracted with reference to it. But as all these general liens infringe upon the system of the bankrupt laws, they ought not be encouraged. Such a general usage ought to be proved by stronger evidence than was offered in this case, especially as it trenches upon the common law right of the subject." The evidence here produced was, first, a book-keeper to the defendants, and their father, for twenty years, who specified two instances of detention of particular goods, until payment of a general balance; the same witness knew there were other instances but could not recollect the particulars: another witness had been their book-keeper in London for five years, and spoke to several times having stopped goods, but could only specify one instance; another witness, who had been a carrier for twenty years, from York to Manchester, deposed to the general usage, and remembered two instances in particular; another carrier, for twenty years, from London to Newcastle, gave the like general evidence; another carrier, for five or six years, from London to Lincoln, Hull, and other places, said, that the custom was to retain till the general balance was paid, and he once kept a bankrupt's goods six months, until he was so paid; another carrier, from Halifax to London, for four years past, had known instances of detaining goods for a general balance, and particularized one. On this evidence, a verdict was found for the defendants; but a new trial was granted, on the ground that there was not sufficient evidence to warrant so general a conclusion. On a second trial, although there was additional evidence of the same kind, the jury found for the plaintiffs; and, on motion for a new trial, it was said, "That the jury might well be jealous of establishing a general lien against the policy of the common law, unless the party make out a very strong case. Most of the evidence being open to observation; being instances of persons paying small sums, rather than incur a risk of a great loss by the detention; of solvent persons, who were, at all events, liable for their general balance; or recent instances, not brought home to the knowledge of the party in the principal cause; the court thought the jury were warranted in finding, that the plaintiff knew of no such usage as that which had been given in evidence, or, knowing it, did not adopt it." And, per Lord Ellenborough, "Growing liens are always to be looked at with jealousy, and require stronger proof; they are encroachments on the common law."

contracted with the carrier under such an understanding; for this, as it is an usage against the general law of the land, will be regarded with the greatest jealousy.

So where a consignor has, by the usage of trade, always paid the carriage, the carrier will not be allowed to set up a lien, on a general balance due, from the consignee, against the former, if the hire on the particular goods carried be tendered him; for, although the property becomes vested in the consignee, immediately on delivery to the carrier, *(s)* yet it shall not operate to defeat the equitable right, which the consignor has of stopping in *transitu*, or charge him with a lien founded on an agreement between the carriers and third persons.

Nor where a part of the goods has been delivered to different persons, as under an indorsement [*74] *or transfer of part of a bill of lading, can the carrier retain the residue, so as to make one consignee pay freight for what was delivered to another, although the goods formed originally but one entire consignment. *(t)* But when the whole is to be de-

(s) Dawes *v.* Peck, 8 Term, R. 330. infra.

(t) Sodergren *v.* Flight, Guild. Sitt. Trin. 1796. cited, 6 East R. 622. Action by the captain, for freight, to try the right of his lien on a cargo of tar, under one consignment, the freight of which was to be paid by the consignee. Before arrival, the consignee had disposed of the whole to one person, and indorsed the bill of lading; and the captain, after delivering part, refused to deliver the remainder until the whole freight was paid him; and held, by Lord Kenyon, "That the whole belonging to one person, and under the same consignment, so that the whole had been received on board under one contract, the captain had a lien on the remainder for the whole freight; but that, if the consignee had sold it to different persons, the captain could not have made one pay for the freight of what had been delivered to another.

livered to one person, under a single consignment, then, although a part has been delivered, he may retain the residue until the freight for the whole be paid him.

A shipmaster, claiming a lien for freight, does not part with it by depositing the goods in the king's warehouses, according to the requisitions of an act of parliament. *(u)*

As the captain is personally responsible for goods, stores, &c. supplied for the use of the ship, he has a lien on the freight and goods to the *amount for which he is responsible, and may in- [*75]
sist on the freight being paid to himself instead of the owners; and if the consignees pay it over to them, after notice from the captain, their goods will still remain subject to his lien, and they liable to repay the freight to him. *(x)* But, as against his owners, he has no lien on the ship for repairs, &c. performed in the course of the voyage. If such repairs are done at home the owners are pri-

(*u*) Said, per Lord Ellenborough, in Ward *v.* Felton, 1 East R. 507. q. v.

(*x*) White *v.* Baring, et. al. 4 Esp. N. P. R. 22. *Assumpsit* on a bill of lading, for freight and primage, by the captain, against a consignee, of the cargo, who had paid it over to the assignees of the owner, (become bankrupt) after a written notice from the plaintiff not to do so, as he was liable for the payment of several debts on account of the ship. And, per Lord Kenyon, "the creditor of a ship has a threefold security: the ship itself, the owners, and the captain. The captain is liable, by reason of the contracts into which he enters on the ship's account; but having contracted, and made himself liable for articles furnished to the ship, he thereby acquires a lien on the goods, as well as freight. And I am of opinion, that his lien is co-extensive with his liability to the ship's creditors; and, of course, if the plaintiff can prove, that the goods were so furnished, the payment by the defendants has been made in their own wrong." Verdict for plaintiff.

marily liable, and he may stipulate against his own liability, and confine the credit to the owners; if they are done abroad, he may hypothecate the ship for them; and, it is his own fault if he subjects himself to any personal liability which he has power to renounce. *(y)*

[*76] *Neither can the master subject the consignee to any duties for wharfage, moorage, &c. against the express directions or contract with the latter, nor for any other charges which are incidental to the ship, and not to the goods. *(z)*

(*y*) Hussey *v.* Christie and others, 9 East R. 426. Case sent by the Lord Chancellor. The captain was engaged by the owners, under a written contract, which only stipulated for his providing the officers and crew, and discharging their lawful demands. During the voyage, necessary repairs were done, and articles procured by him, for payment of which he drew several bills of exchange upon the owner, who, during his absence, became bankrupt. On his arrival the assignees forcibly took possession of the ship. An injunction was obtained to restrain the defendants from disposing of the ship and cargo until his claim should be first satisfied. The question for the Court was, whether the plaintiff had any lien on the ship for the money expended, or debts incurred by him, for the repairs done to her on the voyage? And, per Lord Ellenborough, "Though there must be a beginning of liens, yet I disclaim the right of originating it now; nor can I, in the absence of all authority, create a lien in a case where none has ever before been allowed, and where every case of lien is against the common law. As to the cases in equity, I cannot consider them as professing to lay down any such rule, as that the captain has a lien on the ship for repairs done abroad, at his charge; the only difference between repairs done here, and those done abroad, is, that there he may hypothecate, and here he cannot. The case sent involves no question about the master's lien on *freight*, and therefore I shall give no opinion upon it."

(*z*) Syedes *v.* Hay, 4 Term R. 260. Trover by the consignee, against the captain, for goods which he had left in the hands of a wharfinger, contrary to the express directions of the plaintiff. And the defence was, that every wharfinger, against whose wharf a vessel was moored,

*So where goods are brought to an inn, &c. by any waggon, &c. and the consignee is there ready to receive them, and tenders the price of carriage, *he cannot be made subject to warehouse charges, [*78] or for booking, &c., nor can any lien be insisted on by the warehouse man until such are paid. *(a)*

was entitled to wharfage fees, whether the goods were landed or not; and that the wharfinger, having a lien thereon, detained them. And said by the court, "If the wharfage duty be due, that is an answer to the action. The case in Blackstone (infra) goes a great way to prove, that no such payment can be exacted on the construction of the act; and as to the usage, the evidence was not uniform, and only matter of opinion, and so is unsatisfactory. If no such duty is due, it is clear, that trover will lie against the defendant; for, if one man, who is intrusted with the goods of another, put them into the hands of a third person contrary to orders, that is a conversion."

Stephen *v.* Coster, 1 Bl. R. 423 and 3 Burr. 1409. Case against maltfactors, for unloading malt, at the plaintiff's wharf, and not paying the duties, the malt being taken out of the barge (which was moored to the wharf,) in lighters. And held, "that the act 22 Car. 2, c. 11, which appoints the wharfs, and the rates to be taken, only gives a duty, the nature of which is for laying goods *upon* the wharf, and signifies *from* or *upon* the wharf; this is perhaps a *casus omissus*; an action on the case, or perhaps other remedies, will lie for the wharfinger, or he may cut the cordage by which they fasten; but, the goods never having been landed upon the wharf, no duty could arise." So in—

Bishop and others *v.* Ware, 3 Camp. 360. Case against a ship-master, for not delivering a package of files according to the directions of a bill of lading, but which the defendant detained for wharfage. The plaintiffs had sent a barge along-side to receive them. And it was said, per Mansfield, Ch. J. "If the goods are not landed, the compensation for the benefit derived from the wharf, must be made by the owner of the ship. The goods cannot be subjected to this charge, more than to many others which are incurred by the ship in the course of the voyage. According to the bill of lading, the goods in question were to be delivered on payment of freight; the defendant therefore could have no right to detain them for wharfage."

(*a*) Lambert *v.* Robinson, 1 Esp. N. P. R. Trover, for a parcel of goods brought by the Tunbridge waggon, to the defendant's inn, where the plaintiff was ready to receive them; and they were only ta-

With respect to the lien of a Wharfinger, it is matter of usage, and not of common law, as in the case of carriers and inn-keepers, who are obliged to receive the goods. But this usage, founded as we have seen, on evidence, has been proved to exist so often, and to extend to a right of detaining for their general balance, that it is now considered an established right. *(b)*

[*79]

*§. 6. *Of Freight—Porterage—Warehousing—Wharfage.*

THE liability of land and water-carriers being alike founded, as we have seen, in contract, coupled with the duty by custom; it will not be

ken from the waggon to the scales, to determine the amount of carriage, which was paid, when the defendant demanded a further charge of two-pence for booking: this was refused, the goods having been taken up on the road; it was then demanded as for warehouse-room, and held, by Eyre, Ch. J. "That there was no colour of title to warrant the detaining the goods, as there was no lien given by law in this case. Here the charge was an exaction, no duty having been performed; there having been no entry in the books, nor warehouse-room occupied." See the authorities relating to the lien of ship-masters, in Abbot. Ship. III. c. 3. § 11.

(*b*) Naylor *v.* Mangles, 1 Esp. N. P. R. *Assumpsit* for money had and received. Plaintiff had purchased twenty-five hogsheads of sugar, then lying at the defendant's warehouses, and which the latter detained, as a lien for the amount of a general balance due from the vendor. Plaintiff paid him the whole sum, in order to obtain the sugars, and now sought to recover the sum paid, as such balance; but it was said, by Lord Kenyon, "That the lien, from usage, in the present case, had been proved so often, that he should consider it a settled point, that wharfingers had the lien contended for." So in—

Spears *v.* Hartley, 3 Esp. N. P. R. 81. Trover for a log of mahogany, detained for the wharfage thereof, and also for the balance of a general account: Defendant had a verdict on the preceding rule, which was referred to and recognized by Lord Eldon.

irrelevant to consider in this place a little further, that relation which subsists between the water-carrier and the consignee, when the bill of lading is evidence of a more express contract.

By delivery and acceptance of the goods there is an implied contract between the parties for the due performance of all the stipulations and conditions expressed in the bill of lading, (which may be regarded as the written part) together with all the other common law obligations incident, by the custom or otherwise, to such a bailment. *(c)* As *the bill of lading is the title under which the captain receives the goods, he is strictly bound by all the terms thereof, so as to be liable even for unintentional default; as if he delivers the goods by mistake to a wrong person, &c. [*80]

So also the captain is entitled to recover, against the consignee or his assignees, the freight demurrage, primage, &c. or other claim which he may have, according to the terms of the bill of lading;

(c) Dobbin *v.* Thornton, 6 Esp. N. P. R. 16. *Assumpsit* to recover demurrage on a bill of lading, by which the goods were to be delivered to the shipper, or his assigns, paying freight, &c. and held, that the condition of the defendants having the goods was the paying freight, and conforming to all the other stipulations of the bill of lading. "The defendant, as assignee of the shipper, having here taken to the goods and received them, he is bound by all the conditions of the bill of lading, and is liable to all the terms of it, one of which is, the payment of demurrage, to which he is clearly liable."

Seggart *v.* Scott, Ibid. 22. *Assumpsit* to recover freight of corn from persons (not the consignees,) who had received it, and said, by Mansfield, J. "I think the acceptance of the corn carries with it a claim for freight; and if the party accepts it, though delivered by mistake, it shall not be for him to say that the delivery was wrong. It is the delivery and acceptance that constitutes the liability."

and his freight is to be calculated by the measures and rates therein mentioned. *(d)*

[*81] *As an indorsement of the bill of lading by the consignee, for good consideration, confers a legal right on such assignee, *he* may also maintain an action against the captain in the same manner as the original consignee might have done: but a bill of lading is not transferable like a bill of exchange by mere indorsement. *(e)* And on the

[*82] *other hand, the becoming such assignee, and acceptance of the goods, is an adoption of all the terms of the original contract and its consequent liabilities, as payment of freight, &c. What how-

(*d*) Moller *v.* Living, 4 Taunt. R. 102. *Assumpsit* for freight of wheat from Dantzic to London, under a bill of lading in the German language, at so much *per* last (explained in the margin in English to be 100 lasts of wheat in 2092 bags;) and upon the question of amount of freight according to what measure it was to be calculated, it was held, "that this case could not be distinguished fom the usual one of written contracts, and the parties are bound by the words of this bill of lading, as they would be by any other written instrument, and it is irrelevant to inquire what the real quality may be, according to Dantzic or English measure, since the instrument describes so many lasts specifically contained in so many bags."

(e) Waring *v.* Cox 1 Camp. N. P. R. 369. *Assumpsit* by the indorsee of a bill of lading who had been so constituted by the shipper to stop the goods *in transitu*, in consequence of the first consignee having become bankrupt: and upon this indorsement the plaintiff had brought his action. But it was held by Lord Ellenborough, that "A bill of lading is not transferable like a bill of exchange, so that the mere signature of the person entitled to the delivery of the goods *prima facie* passes the property in them to the indorsee. There must be value upon the indorsement of a bill of lading or no property in the goods is thereby transferred. The right to stop *in transitu* is a personal right, and cannot thus be assigned over to another. Then, if no property passed to the indorsee he could have no right to complain of the non-delivery as a breach of contract in *assumpsit*, or of the conversion of the goods in an action of trover."

ever is such an acceptance, must be determined *from all the relative situations and interests of the [*83] parties, and the nature of the existing contract.(f)

Cox *v.* Harden, 4 East R. 211. In this cause the question arose collaterally, Whether the mere indorsement of a bill of lading by the consignor, without any consideration, would enable the indorsee to maintain trover for the goods in his own name? and the judges intimated a very strong opinion in the negative, on the ground that no property passed by the bare indorsement.

Cuming *v.* Brown, 1 Camp. 104. Trover for wine and brandy, which the plaintiff claimed as the assignee of the bill of lading, of the original consignee (become bankrupt), against the master. The defendant had delivered the goods to an agent of the shipper, authorized to stop them *in transitu*, and the question was, whether the indorsement to the plaintiff was *bona fide* for a valuable consideration, and without notice of any circumstances, as between the consignor and consignee, which should have induced the plaintiff not to have concurred in the transaction. It appeared that the consignee had made acceptances on the goods, which the plaintiff knew were not, at the time of the indorsement to him, made good, but were then running, It appeared that the consignee, although he had not strictly paid for the goods, had given a negotiable obligation to pay: That the plaintiff had also advanced some sums on the transfer of the bill of lading; and the jury found a verdict for him as on an indorsement for a *bona fide* consideration: and Lord Ellenborough held, he was entitled to recover damages for the detention, to the amount of the sums he had advanced for it would be idle to give him a verdict for the whole value when he would afterwards be obliged to refund: and this rule was laid down on the authorities of Lickbarrow *v.* Mason, 2 T. R. 63; and Coxe *v.* Harden, supr. On motion for a new trial (9 East 506,) it was ruled, that the true criterion was, "Does the purchaser of the bill of lading take it fairly and honestly?" the expression, *without notice* "is not to be taken in the restrained sense of notice," *that the goods had not been paid for*, but "without notice of *such circumstances as rendered the bill of lading not fairly and honestly assignable.*"

(f) Cock *v.* Taylor, 2 Campb. 587, & 13 East 399. *Assumpsit* by the owner to recover freight, &c. against the indorsees of the original consignees, and held "that although there was no original privity of contract between these parties, for payment of the freight, yet the taking of the goods from the ship by the purchaser under the bill of lading, and the master, parting with his liens, by giving them up to

*The peculiarity of this contract is, that unless the freight be wholly earned by a strict perfor-

the purchaser at his request, was evidence of a new agreement by him, as the ultimate appointee of the shippers, for the purpose of delivery, to pay the freight due for the carriage of such goods."

But in Moorsom *v.* Keymer, 2 Maule & Sel. 303, *Assumpsit* for freight of coffee, by ship-owners, against the assignee of the bill of lading, who had received the goods from the captain, having paid the duties; it was held, that as the original contract between the owners and the consignees of the goods was under a charter-party of affreightment, however the captain might have insisted upon his lien on the goods, until the freight was paid: yet that having parted with them without making any demand for freight, the court would not raise an implied undertaking in the person receiving the goods, where there was a clear contract under seal between the original parties. The preceding case (of Cock *v.* Taylor) was held to be an authority only in the case of a general ship. Where there is no other party or remedy to have recourse to, the law will imply a promise in order to prevent a failure of justice.

In Bell *v.* Kymer, 3 Camp. N. P. R. 545. Plaintiff had hired the ship from the owner by deed under seal, and let her to freight as a general ship; so that although there was a charty-party between the owners and the charterers, there was no existing contract under seal between the charterers and freighters, and the charter-party could only serve, as between the plaintiff and defendant, to determine the amount of freight. In the action therefore by the charterers, against the indorsees of the bill of lading, for freight, it was said per Mansfield, Ch. J. "I see no difference between the indorsee of a bill of lading and the consignee; there is no difference at all. The defendants became owners of the goods by the indorsement of the bill of lading; they received them when landed under the bill of lading, signed by the master of the ship, by which they were deliverable to the shipper, or his assigns, on payment of freight, as per charter-party, with primage and average accustomed." "The party who takes the goods under a bill of lading, by which they are made deliverable on payment of freight, must pay the freight accordingly." And the distinction was taken by Le Blanc, J. (in Moorsom *v.* Kymer) that the plaintiff here had no other means of resorting to any other person for the freight.

Dick *v.* Lumsden, Peake 188. Trover by a subsequent indorsee of the consignee against the master, for a quantity of beef and pork, which he had delivered to the original indorsees, although such later indorsement of the bill of lading was irregular, and made by mistake.

mance of the voyage, no freight is due or recoverable; nor can a promise to pay *pro rata*, be *implied, unless the goods are voluntarily accepted [*85] at such an imperfect stage of the contract. *(g)*

The plaintiff, knowing the circumstance, had paid bills for the honour of the original consignees on the goods in question; and having received from the shippers a regular indorsement of the bill of lading, sought to recover the goods. But held, "That as a letter had been sent to the original consignees from the shippers, stating their intentions to have properly transferred the goods to them, it was sufficient transfer, and bound the plaintiff who had notice of the circumstances." The original consignee having therefore transferred the goods under a competent authority, it was not essentially necessary that he should have the possession of the goods, or an actual indorsement of the bill of lading. Plaintiff was nonsuited.

(g) Osbord *v.* Groning, 2 Camp. 466. On issue directed by the Chancellor to be tried, as to a right of compensation or lien for short freight. There was a charter-party for a direct voyage, which the plaintiff was prevented from completing by orders issued by different belligerents after the inception of the voyage; in consequence of which, the goods were brought to England, and taken possession of by agents on behalf of the consignees, to prevent the captain from tortiously disposing of them, and it was agreed that the possession so taken should not prejudice the captain's right to lien, if found for him; and said per Lord Ellenborough, "Freight could only be earned by performing the terms of the charter-party. Then the right of compensation must arise out of some contract express or implied: No express contract is set up, and from what can it be implied? The possession which has been taken of the goods, being without prejudice to the rights of the parties, is no acceptance of the goods short of the port of destination, and no foundation for a promise to pay *pro rata itineris*." Verdict on the issue for the defendant. On motion to the Lord Chancellor for a new trial, his Lordship refused, approving of the direction to the jury, and the issues as found. But he directed an action to be brought by the plaintiff for freight, and that defendant should admit an acceptance of the goods at London, short of their destination, if it should appear that the plaintiff could not have been reasonably required to proceed on the voyage. This the jury found he might have done, and there was accordingly a verdict for the defendant also in that action.

Nor will any acknowledgment that the freight was to have been paid by the shipper at the port of lading, be a suffient consideration for the freight
[*86] *as such* if not earned: and if the *freight has been paid it may be recovered back. *(h)* But when

(h) Mashiter *v.* Buller and another, 1 Camp. N. P. R. 84. *Assumpsit* for freight agreed to be paid on the shipment of the goods. The ship was lost, and the only ground of contract for such payment was, its being expressed in the bills of lading "freight, &c. *being paid in London*," and the shippers *paying freight, &c. in London.* But held, that these words only meant that the freight should be paid in London, instead of the port of delivery; and that they by no means dispensed with the perforance of the voyage. "If the defendants had paid the freight upon shipment of the goods, they might have recovered every penny of it back again."

Blakey *v.* Dixon, 2 Bos. & Pul. 321. On demurrer to a count on a promise to pay the money *due* for freight on delivery of the bill of lading; held, "that to maintain such a count two things must concur, first, something to be *due* for freight; secondly, the delivery of the bill of lading. With respect to the former, nothing was averred to be due for freight; nothing could be due on the delivery of the bill of lading, but by special contract; for *prima facie*, the freight is not due until the arrival of the goods." The count was held therefore to be bad. "If the plaintiff meant that the defendant undertook to pay for freight of the goods on delivery of the bill of lading, though no money should be due for freight, he ought not to have laid the promise to be to pay the money *due* for freight." So in—

Chase *v.* Lovering, Sty. 220. On motion in arrest of judgment, in *assumpsit*, to pay 84*l.* out of freight, for that it did not appear that any freight was due; the objection was held good.

Curling *v.* Long, 1 Bos. & Pul. 634. *Assumpsit* for freight on a contract to load the goods on board and bring them to England; but the ship, when ready to sail, was cut out of port by an enemy, recaptured, and afterwards sold, and the proceeds (after deducting salvage) was remitted to the defendant; and held, "that though the master had had the trouble of loading, yet the recompense was included in the freight; and the contract is entire, and indivisible. At common law all the expenses of loading are included in the freight; and if the party be not entitled to freight he can demand no satisfaction for loading. The inception of freight is breaking ground (Molloy, Lib. 2. c. 4 § 3, 5,

there is a special contract for previous *payment, before freight is earned, the having received the goods on board would be a good consideration to support an action on such agreement.

Nor even on inchoate right to freight attaches until the ship has broken ground; when she begins to move she begins to earn the freight; and this rule is intended to prevent the delay which would probably be occasioned if the freight commenced sooner. To this rule there appears however an exception, when the fault is not in the captain, as in case of an embargo, if the goods are forfeited, for there the fault seems* more in him whose [*88] property the goods are *(i)*, than in one who is a mere agent for their conveyance.

6.) By the marine law an inchoate right to freight attaches from the ship's breaking ground, and is consummated upon her arrival at the port of destination. By that law parties may recover, *pro rata*, if the voyage be interrupted; and by the common law, where a contract cannot be performed, a meritorious consideration may sometimes arise, to entitle a party to recover in *assumpsit* for work and labour after the contract has been broken: as where the shipper has the advantage of the carriage, though the original contract be gone, the master is entitled to a recompense; not however, on the foot of the old contract, but on a new contract which springs out of it." Osbord *v.* Groning, 2 Camp. 466. supr

(*i*) "In case a ship is freighted out, and in consequence of the agreement receives her lading aboard, if an embargo happens afterwards, and her cargo is taken as forfeited, yet the owners shall, notwithstanding, receive the freight, as the fault was not in them but in him whose property the goods were." Beawes' Lex. Merc. 87, & Dig. Lib. 19. tit. 2. c. 61.

Luke & al. *v.* Lyde 2 Burr. 881. "If a freighted ship becomes accidentally disabled on its voyage, (without the fault of the master) the master has his option of two things, either to refit his own vessel (if that can be done within convenient time) or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees,

As the contract is complete, and the duty performed on which the reward is founded, so also the right to freight is consummated upon the ship's arrival at the port of destination. By the marine law, if the voyage be interrupted, the parties are entitled to recover *pro rata*; and by the
[*89] common law of England, if the *contract* be *dissolved, or *cannot* be performed, a new contract arises upon a meritorious consideration for work and labour; but an embargo, which is only a temporary suspension, does not dissolve the contract. Freight, however, although not earned, is yet an insurable interest, if the goods are so situated as to create a well-grounded expectation of freight being raised, for it is a contract of indemnity. But this does not affect the marine or common law as to the recovery of freight itself between the ship-
[*90] owners and freighters. *(k)* So *also freight may

and will not let him do so, the master will be entitled to the whole of the freight of the full voyage (and so it was determined in Dom. Proc. in the case of Lutwidge & How *v.* Grey.) It is nothing to the master of the ship whether the goods are spoiled or not, and what the owner makes of the goods; nor indeed can that properly be known till after the freight is paid; for the master is not bound to deliver the goods till after he is paid the freight. Provided the freighter takes them, it is enough if the master has carried them; by so doing he has earned his freight. The merchant must take all or none; he shall not take some, and abandon the rest. If he abandons all, he is excused the freight; and he may abandon all though they are not all lost," per Ld. Mansfield.

(*k*) Tonge *v.* Watts, 2 Stra. 1251. *Assumpsit* on an insurance of ship and freight, the average on the former was paid into court by the defendant; the latter, it was contended, he was not liable for, as the goods were not on board, although the ship might have earned it, but for the accident which prevented the voyage. But as the goods were not actually loaded on board, so as to make the plaintiff's right to

be pledged; and if the ship-owner is also part-owner of the cargo, and sanctions the pledge of it by his partners, without excepting the freight, it

freight to have commenced, he could not be allowed it. In Montgomery *v.* Egginton, 3 T. R. 362, there was an inception of the contract, because part of the goods was on board; and plaintiff recovered on an insurance policy on such freight. And in Thompson *v.* Taylor, 6 T. R. 478, where, under a contract by charter-party to go to Teneriffe to receive the freight, "the plaintiff, by proceeding thither, had begun to perform part of his contract, which, if matured, would have entitled him to his freight; he may recover on the policy, which was an insurance on that freight."

Hadley *v.* Clarke and others, 8 T. R. 259. *Assumpsit* for not carrying goods. The ship in fact being detained for two years by an embargo; and held "That although an embargo being imposed during the war might be a legal interruption of the voyage; yet, that such an order in council, or act of parliament, only suspended the execution of the contract, but would not dissolve it; and as when the defendants entered into this contract it was incumbent on them to specify the terms and conditions, and as they did express the terms, and absolutely engaged to carry the goods (the dangers of the seas only excepted,) *that* therefore is the only excuse they can make for not performing the contract: if they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract So All. 27. And." No line has or can be drawn to show, that though an embargo of a certain duration would not put an end to such a contract, an embargo of some longer duration would. Said by the court in Grote *v.* Milne, 4 Taunt. 133.

So, a retardation of the voyage is no ground of abandonment as for a total loss, where freight is subsequently earned. Falkner *v.* Ritchie 2 M. and S. and cases cited.

Moorsom *v.* Greaves and others, 2 Camp. 627. Action for freight under a charter-party. The vessel in pursuance of which had unloaded part of her cargo, and by the express orders of the defendants agents had proceeded to a port, where she was detained for a breach of blockade by the government, but was afterwards liberated, and completed her voyage; and Lord Ellenborough thought, that as the ship was taken in proceeding by order of the supercargo, the voyage was never discontinued, and the freighters were answerable for the subsequent detention in the same manner as if it had arisen from contrary winds, or an embargo.

will be considered as pledged together with the cargo.

A Warehouseman is not like a carrier, bound by any custom of the realm, nor to be considered as an Insurer; he stands therefore in the situation of
[*91] an ordinary bailee for hire, and so is answerable* only for ordinary neglect, &c. *(l)* The difficulty which has arisen in cases respecting them has originated from the uncertainty when the carrier was to be considered as having the goods in his possession in one or other of these characters; he may,
[*92] when his duty as a carrier is determined,* assume the new and less responsible one of a warehouse-

(*l*) "When a private man demands and receives a compensation for the bare custody of goods in his warehouse, or store-room, this is not properly a *deposit*, but a hiring of care and attention; it may be called *locatio custodiæ*, and the bailee may be denominated *locator operæ*, since the vigilance and care which he lets out for pay are in truth a mental operation: whatever be his appellation, either in English or Latin, he is clearly responsible, like other interested bailees, for ordinary negligence When a person, who, if he were wholly uninterested, would be a *mandatary*, undertakes for a reward to perform any work, he must be considered as bound still more strongly to use a degree of diligence adequate to the performance of it. His obligation must be rigorously construed; and he would perhaps be answerable for slight neglect, where no more could be required of a *mandatary* than ordinary exertions." Sir W. Jones' Law of Bailments, 96.

Cailiff *v* Danvers, Peake 113 *Assumpsit* against a warehouseman for negligently keeping a quantity of ginseng which the rats had got at and destroyed, although every precaution had been taken; and Lord Kenyon said "that a warehouseman was only obliged to exert reasonable diligence in taking care of things deposited in his warehouse. That he was not to be considered like a carrier, as an insurer; and that the defendant in this case having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage which he could not prevent."

1 Esp. N. P. R. 315. Fincaune *v.* Small—Moore *v.* Morgue. Cowp. 480.

man, for this is for the convenience of the owner of the goods, but they cannot be coupled, nor exist at the same time.(*m*) Where the duty of the carrier ceases only by delivery to the party, his liability as such continues whilst the goods are deposited in any warehouse, &c. (for doing which, even although a separate price be charged,) or whilst they are in the hands of any porter; the warehouseman, porters, &c. for this purpose being considered only as his servants, and he will be liable for their defaults.

If by fraudulent alteration, or other false pretence, more be demanded and taken for porterage, &c. than is legally demandable, this is an offence within the statute 30 Geo. 2. c. 24, for obtaining money under false pretences, and subjects the offender, on conviction, to fine *and* imprisonment, or pillory, or public whipping, or transportation for seven years; or it may be considered as an offence within 39 Geo. 3. c. 58, which enacts, "That if any porter, or other person employed in the porterage, or delivery of boxes, baskets, packages, parcels, trusses, game, or other things,* shall take [*93] for the same a greater sum than the prices fixed, they shall forfeit for every such offence a sum not exceeding 5*l.* nor less than 20*s.*; and this remedy

(*m*) Garside *v.* Proprietors of Trent and Mersey Navigation Company, 4 Term R. 581. sup. Where the Court considered the defendants as warehousemen only, and therefore not liable for inevitable accident, as fire, &c. but in Hide *v.* same Company, 5 T. R. R. 389, supr. in which the defendants charged for the cartage and warehousing, they were considered liable, inasmuch as the goods were in their hands in the course of their duty as carriers, to deliver them to the parties to whom they were directed.

on the latter statute has been held to be cumulative, and not to take away the remedies previously existing at common law, or by other acts of parliament. It will however be necessary in an indictment on the latter statute to describe the thing according to the fact, and not by any generic term, as it will be a fatal variance. *(n)*

[*94] *Wharfage seems only to be due when the goods are laid *upon* the wharf for the purpose of being loaded or unloaded. It differs specifically from anchorage or mooring; these are charges rather incidental to the ship than the goods. In London, the duty for wharfage and cranage is created by Stat. 22. Car. 2. c. 11, which enacts, "That a public wharf or key be left along the river side from the Temple to London bridge, forty feet wide, and

(n) Rex *v.* Douglas, 1 Camp. 212 Prosecution against a porter for obtaining money under false pretences, by counterfeiting a ticket to obtain a greater sum than the lawful charge; against which indictment it was objected, first, that being a basket it was laid as a parcel, and the Stat. 39 Geo. 3. c 58, specifies baskets, wherefore the indictment should have described the thing according to the fact; and Lord Ellenborough held, that it would upon that satute have been a fatal variance, but it turned out to be on the Stat. 30 Geo. 2. c. 24, and so the description was well enough. It was then objected that, as the money was laid to have been the property of the prosecutrix, whereas it had been paid by the servant; but held, that although her having subsequently reimbursed the servant did not make it her property at the time, so as to support such an allegation, yet as it appeared that the servant at the time had some money belonging to his mistress, it was sufficient to sustain the indictment; lastly, although the offence certainly came within the 39 Geo. 3, it was not necessary that the indictment should be on that statute; the remedy thereby given was cumulative, and did not take away the remedies which before existed at common law, or by other acts of Parliament. The defendant was accordingly convicted.

For the further regulations concerning the porterage in London, vide Appendix.

that no vessels shall lie before the same longer than shall be necessary for the lading or unlading of goods, without consent of the several wharfingers; and that it shall be lawful for all persons to load or unload goods at the same, paying for wharfage and cranage such rates as the king in council from time to time shall appoint."*(o)* And we have seen that even when wharfage is due, by the goods having been so unloaded, against the express directions of the consignee, he does not thereby become subject to the charge; but if the goods are detained, trover will lie for them; for whatever act of another brings a charge upon the owner, contrary to his orders, is a tortious conversion.*(p)*

§ 7. *Property in Goods, when and in whom vested.*

THE delivery of goods to a carrier is a delivery to the consignee so as to vest in him a legal right of property, and the carrier becomes his agent even although the consignor *agrees to pay the carriage. [*95
(q) And this vestment of the property is consider-

(o) Stevens *v.* Costor, 3 Burr. 1409, & 1 Bl. R. 423.

(p) Syeds *v.* Hay, 4 T. R. 260, supr.

(q) Dawes *v.* Peck, 8 Term R 330. Case by consignor against a carrier, named by the consignee, for so negligently carrying spirits, that the permits expired, and the goods were seized; and said, "that the question of the proper person to maintain the action must be governed by the consideration in whom the legal right was vested, for he is the person who has sustained the loss, and the proper person to call for a compensation. The right of property on which this action is founded is not to fluctuate according to the choice of the consignor or consignee, that either of them may at his pleasure, maintain an action against the carrier for the non-delivery or damage of the goods, what was done by the consignor in respect of the booking was as agent of

ed so absolute from the instant they are delivered,
[*96] that where *goods were delivered to a carrier a day before, and reached the consignee a day after,

the consignee, at whose risk the goods were sent. The legal property of the goods was, by the delivery to the carrier, vested in the consignee, and the action ought to have been brought by him." Judgment for the defendant.

Dutton *v.* Solomonson, 3 Bos. & Pul. 583. *Assumpsit* for goods sold and delivered, under a contract to pay for them by a bill at two months, which the defendant afterwards refused to accept, until after the goods had arrived, and then only at three months. The writ was sued out before the bill, if accepted, could have become due; and on that point it was held that the action could not be commenced before the expiration of the period which the bill had to run. (Mussen *v.* Price, 4 East R. 147. And upon the principal question, as to the delivery of the goods, which did not arrive until after the writ had been sued out: said per Lord Alvanley, "When this point was first mentioned I was surprised, for it appeared to me to be a proposition as well settled as any in the law; that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the consignee; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods it is at his risk. The only exception to the purchaser's right over the goods is, that the vendor, in case of the former becoming insolvent, may stop them *in transitu*."

Vale *v.* Bayle Cowp. 294. Action for goods sold and delivered, which the purchaser had directed to be sent by land-carriage generally. The plaintiff accordingly sent them by the only conveyance there was by land-carriage, and the goods were lost on the road. And, per Lord Mansfield, "It is as much as if the defendant had mentioned the particular carrier by name, for there being but one carrier the plaintiff had no choice by whom to send them. If a vendor take upon himself actually to deliver the goods to a vendee, he stands to all risks, but if the vendee order a particular conveyance, the vendor is excused." And in 3 P. Wms. 186, per Ld. Ch. J. Eyre, "Though a trader in the country does not appoint a carrier, yet if the goods be embezzled he shall be liable, because he leaves it in the breast of the person to whom he gives the order to send them by whom he pleases."

he came of age, it was held that he was not liable for the price, as being an infant. (*r*)

Such a rule is in some degree necesssary to protect the carrier; for, generally speaking, he knows *nothing of, nor has any clue to find, the consignor, [*97] but only the party to whom the goods are directed, and to whom he looks for the price of the carriage on the delivery. (*s*) Nor will the circumstance of the consignor's having paid the booking, alone make him a principal to the contract with the carrier, since that would be considered to be done as the agent of the consignee, at whose risk they are sent. Where however the consignor has paid the carriage also, that it is sufficient to raise a privity of contract with the carrier, and he may maintain an action against him for the non-delivery of the goods according to the implied undertaking. (*t*)

(*r*) Griffin *v.* Langfield & ux. 3 Campb. 254. Action for goods sold to the wife *dum sola*, who came of age September 20th. The goods were delivered to a carrier for her on the 18th, and reached her on the 21st; and it was said by Lord Ellenborough, "When the goods were delivered to the carrier, the property vested in the defendant, and she might immediately have been sued for their value. Therefore, if she was under age on the 18th, the action cannot be supported."

(*s*) Dawes *v.* Peck, 8 Term R 334, supr.

(*t*) King & al. *v.* Meredith, 2 Camp. N. P. R. 639. Action by the vendor against the vendee for the price of brandy, the quality of which, when delivered to a carrier, was of the legal proof, but was so far reduced whilst in his possession, that it was seized by the excise. The carriage was to be paid by the plaintiffs: And it was said, per Lawrence, J. "The mode in which the carrier was to be paid makes no difference. The moment the spirits were delivered to him the property vested in the defendant. The plaintiffs by paying the carrier, did not become insurers of the spirits while in his hands." Verdict for plaintiffs.

*The general rule holds equally whether the consignee directs the goods to be sent by a parti-

Hart *v.* Sattley, 3 Camp. N. P. R. 528. Action for the price of a hogshead of gin, sold by plaintiff's traveller, and delivered to a carrier, by whom similar orders had been sent; and held, that this was such a delivery and receipt of the goods as to bind the parties without further contract under the statute of frauds. Per Chambre, J. "I think, under the circumstances of this case, the defendant must be considered as having constituted the master of the ship his agent *to accept and receive the goods.*" V. Huxham *v.* Smith, 2 Camp. N. P. R. 21.

Cooke *v.* Ludlow, 2 New R. 119. *Assumpsit* for the price of a chaff-cutter, &c. directed to be sent by *any* conveyance, but which, through the fault of the wharfinger, to whom it had been delivered, was sent by a different vessel to the one notified, and there remained in the warehouse unclaimed, until the plaintiffs demanded payment of the bill. And it was held that the plaintiffs having done every thing which they were bound to do, were entitled to recover: and, per J. Heath, "I do not consider the wharfinger as in any degree the agent of the plaintiff; he is the agent of the defendant, by whose order and direction the goods were sent."

Moore *v.* Wilson, 1 Term R 659. *Assumpsit* by consignor against the defendant, a common carrier, for not safely carrying and delivering goods for a certain hire and reward alleged to he paid by the plaintiffs, but which it was proved was to be paid by the consignee; and held, that whatever might be the contract between the vendor and vendee, the actual agreement for the carriage was between the vendor and carrier, the latter of whom was by law liable upon that agreement: and the rule was made absolute for setting aside the nonsuit. 1 Atk. 248.

Davis and Jordan *v.* James, 5 Burr. 2680. Consignor against the carrier for not delivering goods sent by him. The question was, in whose name the action ought to have been brought; and, per Lord Mansfield, "The vesting of the property may differ according to the circumstances of the case, but it does not enter into the present question. This is an action upon the agreement between the plaintiffs and the carrier. The plaintiffs were to pay him; therefore the action is properly brought by the persons who agreed with and were to pay him." Anonymous, cited 3 Esp. 115. Action against a carrier for not delivering goods to the person by whom they were delivered to the carrier; the latter being indemnified by a person who claimed them. And Mr. J. Gould would not permit him to set up any question of property out of the plaintiff; and held, "that he having received them from him, was precluded from questioning his title, or showing a property in another person." And Lord Kenyon admitted the authority of this case as law.

cular *conveyance or not; in the former case it is a direct appointment by him of a carrier for the purpose; in the latter he shall stand to the risk, because he leaves it in the power of the person of whom he has ordered the goods, to send them by any carrier he thinks fit.

Nor is there any difference in this respect, between goods sent from one part of England to another, and goods sent to a foreign country, except that in the latter case no property can be recognized in any other person than the consignee named in the bill of lading. The delivery on board immediately vests the property in him. (*u*) Hence, if *the bill of lading establishes a privity of contract between the consignor and the captain, as stating the shipment and payment of freight as a consideration on the one part, and a promise of safe delivery on the other, the captain is estopped from saying that the shipper has no property in the goods, so as to be damnified by his breach of the contract. The shippers may therefore in such case recover, but they will hold the damages re- [*100]

(*u*) Brown *v.* Hodgson, 2 Camp. N. P. R. 36. Action by the shipper against the ship-owner for special damage sustained by his having made a false affidavit, whereby the goods were libelled in the admiralty court as Danish property (then illegal), although they were afterwards restored. But as the goods were expressed in the bill of lading to be shipped by order and on account of Hesse and Co. the plaintiff was nonsuited, as not having any property in the goods; and per Lord Ellenborough, "I can recognise no property but that recognised by the bill of lading. This action cannot therefore be maintained."

Joseph *v.* Knox, 3 Camp. 321, infr.

covered, as trustees for the real owner of the goods. (*x*)

A carrier has such a property in the goods as will enable him, like any other bailee, to maintain his possession against all but the rightful owners, or to recover them by action in trover. (*y*)

So also the driver of a stage-coach, &c. has as against his employers only a bare charge, but as
[*101] *against all the rest of the world he has such a special property as will enable him to charge any wrong-doer as upon his own goods, for he has in fact the possession and entire control over them. (*z*)

(*x*) Joseph and others *v.* Knox, 3 Camp. 321. Action against a ship-owner for not carrying goods. The bill of lading stated the goods to have been shipped by the plaintiffs in London, and that the freight was paid there; and said by Lord Ellenborough, "I am of opinion that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. To the plaintiffs, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his agent, he cannot say to the shipper, they have no interest in the goods, and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the same recovered as trustees for the real owner."

Annon. 3 Esp. 115, supr.

(*y*) 2 Bl. Com. 453.

(*z*) Deakin's case, Leach's C. C. 862. Indictment by the proprietors, against the drivers and another, for purloining a box in the course of conveyance by their coach; and upon the question, whether the driver had the *possession* of the goods, or the *bare charge* only; it was said by Hotham, B. in delivering the opinion of the twelve judges, as in the text, and also, "That the law, on an indictment against the driver of a stage-coach, on the prosecution of the proprieters, considers the driver to have the bare charge of the goods belonging to the coach; but on a charge against any other person, for taking them tortiously and feloniously out of the driver's custody, *he* must be considered as the possessor."

§ 8. *Stoppage in Transitu.*

But although the property is thus absolutely vested in the consignee, by delivery to the carrier, it is not so entirely, but that there remains an equitable power in the consignor of resuming the property, under certain circumstances, before it actually gets into the possession of the consignee. When this right is exerted, the property becomes re-vested in him as much as if he had never quitted the possession.

However, at first, this right was considered only an equitable remedy in cases of fraud or insolvency; it has now become firmly established as a *common law right,(z) and continues until the goods have reached either the actual or constructive possession of the consignee; for then he, and all who claim under him, acquire a complete dominion over them.(a) [*102]

(z) Oppenheim *v.* Russel, 3 Bos. and Pul. 44, supr.

(a) Ellis *v.* Hunt, 3 Term R. 464. Trover by the consignor, against the assignees of the consignee (become bankrupt,) who, on the arrival of the goods at the end of the journey, had put their mark upon them, but could not remove them, because immediately on their arrival they were attached by process of foreign attachment, by one of the bankrupt's creditors. The countermand from the plaintiffs did not reach the carrier until four days after this happened; and it was held, "that when the mark was so put upon them by the provisional assignee, they were no longer *in transitu*, but were delivered to the consignee, as far as the circumstances would permit, and that instant the warehouseman became the agent or servant to the bankrupt. All the cases proceed on the ground that the goods when stopped were *in transitu*, and that there had not been an actual delivery to the bankrupt; and an actual delivery is necessary to divest the vendor's right of stopping the goods *in transitu*."

*Hence no agreement made between the consignee and his assignee, whether direct or implied, can defeat or affect this right of the consignor. It has been held to be a power tacitly reserved out of the former control which the consignor had over his property at the time of delivering it to the carrier, and therefore paramount to any agreement between the carrier and the consignee, in respect of any duty, or right of lien, which may arise upon those or other goods; so that if the consignor would exert this privilege, and reclaim the goods, he is only subject to such lien or duty, as may have arisen in consideration of that particular bailment, for the labour and diligence bestowed on the goods about which it was employed.(b) The principal point, and indeed only difficulty, is, in determining what shall be such an actual or constructive delivery into the possession of the consignee, as will determine this right of the consignor, for then the state of the transit ceases.

If the consignee appoints another carrier or agent to receive the goods, this may be a constructive

Hodgson *v.* Loy, 7 Term R. 440. Trover by assignees of consignee, against the agent of the consignor, for butter, for which the consignee had paid a part; but held, per Lord Kenyon, "The right of the vendor to stop the goods *in transitu* is a kind of equitable lien adopted by the law, for the purposes of substantial justice, and not proceeding on the ground of recinding the contract. We are clearly of opinion, that the circumstance of the vendee having partly paid for the goods, does not defeat the vendor's right to stop the goods, the vendee having become bankrupt; and that the vendor has a right to re-take them, unless the whole price has been paid." Vid. Feise *v.* Wray, 3 East R. 93, 2 Vern 203.

(*b*) Oppenheim *v.* Russel, 3 Bos. and Pul. 49, supr.

delivery to the consignee, for many purposes; but, it is said, that only an actual delivery can divest the right of stopping them *in transitu*.

There may however be an actual delivery, without the necessity of a corporal touch, or even *that the consignee(c) should see them; as when the goods are put on board a vessel, chartered by him,(d) or, if they are handed over to his *packer, and his agent opens, and examines the quality of [*104] [*105]

(c) Ellis *v.* Hunt, 3 Term R. 468, supr.

(d) Boehtlinck *v.* Schneider. 3 Esp. N. P. R. 58. Trover for tallow, by consignor, against the assignee of the consignee. The tallow was delivered on board of a vessel chartered by the vendee, but before it reached him he became bankrupt, and the plaintiff sent word to his agent to stop it *in transitu;* and held, per Lord Kenyon, "The whole question is, Whether there was a delivery to the consignee of the goods, before this letter was written, or not? Before the delivery, the party may annex any condition to it, but not after. If the ship was then chartered by the consignee, it is a complete delivery of the goods to him, and there can be no stopping *in transitu;* and it makes no difference whether the act of bankruptcy was then committed or not." Vid. Boehtlinck *v.* Inglis, 3 East 381, infra.

Fowler et al. *v.* M'Taggart, 1 Term R. 522, where it was held, by Grose, J. at Bristol, "That a delivery of goods into a ship chartered by the vendee, who afterwards became a bankrupt, was a delivery to him, so as to defeat the vendor's right to stop them *in transitu*. Here however the ship had been chartered for three years, during which time the bankrupts were to have complete control over her; and the goods were put on board, not for the purpose of being conveyed from the plaintiffs to the bankrupts, but that they might be sent by the latter on a mercantile adventure.

But in Boehtlinck *v.* Inglis, 3 East R. 381, the bankrupt had no control over the ship, but had merely contracted with the master to employ his ship in fetching goods for him, which (it was said) "does not differ from a similar contract entered into by the consignor by the directions of the consignee, at the loading port, for the conveyance of the goods from him to the vendee; in each case the freight is to be paid by the latter; in each case the ship would be hired by him: the goods are still to be considered, on their passage or transit, from the con-

the goods, the right would be gone.(e). *And so if any other act of ownership be done by the consignee or his agent.(f)

signor to the consignee. The right of stoppage cannot depend on the contract to consign goods amounting to half the tonnage of the ship, or a complete loading, or any quantity." The authority of the preceding case was recognized.

In Inglis *v.* Usherwood, 1 East R. 515, which arose out of the same transactions; there it was held, "That if the delivery on board of a ship chartered by the bankrupt had happened in the port of this kingdom, it would in effect have been a delivery to him; but that the Russian ordinance, which enables a consignor to re-possess himself of the goods, even after such a delivery, took it out of the rule, and the plaintiffs recovered the amount."

(e) Leeds *v.* Wright, 4 Esp. N. P. R. and confirmed in C. B. 3 Bos. and Pul. 320 Trover against a packer, employed by an agent, for the purchasers (who had become bankrupts,) to recover goods in their possession, upon the ground, that, until the goods got into the possession of the principals, the vendors had a right to stop them *in transitu;* but held, per Lord Alvanly, "That as the contract was with the agent, and the delivery to his order, he having a discretionary power over them, the plaintiffs had no right to stop them after they came into his possession, and he had exercised any act of ownership on them. Here the agent had unpacked them, and having taken away some, re-packed the rest." Plaintiff nonsuited.

Scott and others *v.* Pettit, 3 Bos. and Pul. 469. Trover for goods, by the assignees of the consignor, against the packer of the consignee, to whom they had been delivered under a general order, as the consignee had no warehouse of his own; and held, that there being no other place of delivery, the goods when arrived there were in the place of ultimate delivery, and consequently were no longer liable to the right of stoppage *in transitu.*

(f) Wright *v.* Lawes, 4 Esp. N. P. R. 82. Case against a warehouseman, for non-delivery of goods, delivered by plaintiff's agent to him, to be kept. Plaintiff had agreed with one Shevill for four pipes of wine, to be paid for partly in money, partly in goods. Shevill obtained the wine from Bamford and Co. by means of an agent in London, who turned out to be a swindler; and Bamford and Co. stopped the wine in the defendant's cellar, where it had been deposited by the plaintiff's agent, who had, with the plaintiff, exercised an act of ownership over the wine, by taking samples, &c. And it was held, by Lord Kenyon, "That as the plaintiff has made out a good title to the wine, under a *bona*

So if they are delivered to a warehouseman, to whom the consignee pays rent for warehousing* [*107] them,(g) or if the consignors themselves charge

fide agreement, it is too much to say that a corporal touch is necessary to confer a property in the consignee; and though they have not reached the plaintiff's own abode, where they were to be ultimately delivered, yet as they had been delivered according to the bill of lading, the carrier's responsibility was at an end, and the delivery was complete. There was no right in Bamford and Co. to stop them *in transitu.*" Richardson *v.* Goss, 3 Bos. and Pul. 127, supp.

Stoveld *v.* Hughes, 14 East, 308. Trover for timber, against vendors, by the assignee of the original vendee, who communicated his having purchased it to the defendants, and, with their consent, marked with his initials such part of the timber as still remained in their possession; and it was held, "That this was such an express assent to the transfer of the property, as made the delivery so far executed, that the defendants could no longer stop it *in transitu.*"

(g) Richardson *v.* Goss, 3 Bos. and Pul. 119. Trover by consignor against the wharfinger, who detained the goods as a lien on a general balance from the consignee; but as the consignee, becoming insolvent, had countermanded his order, it was held, the defendant could not set up such a lien; but said, per J. Chambre, "I should strongly incline to think, that if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, that the journey would be at an end when the goods arrived at such warehouse."

Mills *v.* Ball, 2 Id. 457. Trover for madder and indigo, by consignors, against a wharfinger, who paid freight and other charges of the goods to Exeter, and was to have forwarded them to their destination, as the paymaster and agent of the consignee, to whose account they were put in the wharfinger's books. The vendee having given notice to the vendors of their insolvency, the latter gave notice to the wharfingers, and demanded the goods as their property, and the defendant gave an undertaking not to deliver them until he was certain of a safe delivery; held, "that a demand by the vendor, whilst the goods are *in transitu*; defeats the contract; and the goods being still *in transitu*, and the consignees having done nothing to take possession whilst they remained with the wharfinger, the latter not having been particularly employed by the vendee, is to be considered as a middle-man."

Dixon and others *v.* Baldwen, 5 East, 175. Trover for eighteen bales of cotton twist, by the assignees of the consignee, against the consignor,

him with rent for keeping the goods in their ware-
[*108] *houses, after the time they ought to have been taken away by the terms of the contract.*(h)*

So the right is gone, if the same warehouseman is agent for both parties, and the consignor gives an order to him to deliver the goods to the consignee, although the warehouseman does not even make a
[*109] transfer to his name in the books, for it *is an acknowledged parting with the possession and right over them.*(i)* So if he sends an unindorsed bill of

who had seized the goods, whilst in the hands of a person describing himself to be merely an expeditor of goods according to the directions of the consignee, a stage, and mere instrument between buyer and seller; and it was agreed to by three judges against Grose, J. "That the transit was at an end; upon the same reasoning as in Hunter *v.* Beale, (cited in Ellis *v.* Hunt, 3 Term R. 467); the transit of the goods having once been completely at an end, in their direct course from the vendor to the vendee, and were thence actually launched again in a course of conveyance *from him*, in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete; the *transitus* for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels, towards a new and ulterior destination."

(*h*) Hurry *v.* Mangles, 1 Camp. 452. Trover for oil, by vendee of J. S. against the vendors (who were also warehousemen.) The oil was paid for by J S. by acceptances, and continued to lie in the vendor's warehouse. J. S. sold it to plaintiffs, who paid him for it, and demanded the oil of the defendants before the acceptances of J. S. were due; but as he had become insolvent, the defendants claimed a right to stop the goods *in transitu*. No transfer had been made in the defendants books to J. S. but they had received warehouse rent from him, for the time it had been kept by them, after the period it ought to have been taken away, according to the terms of sale; and held, "That this was an executed delivery; the *transitus* was at an end. The goods were as much transferred to the person who paid the rent, as if they had been removed to his own warehouse, and there deposited under lock and key."

(*i*) Harman and others *v.* Anderson, 2 Camp. N. P. R. 243. Trover for butter, by assignees of vendee, who, along with the invoice, had re-

lading to the consignee, who disposes of the goods under it.

Where however the consignor asserts his right, and demands the goods of the carrier, the latter shall not be allowed to question the title of a person from whom he received them, nor be permitted to prove the property in another party, so as to oust the consignor of this right.*(k)* Nor where a mere claim of the goods has been made *by the consignee, without any actual transfer made, or possession given, shall it be considered sufficient to defeat the consignor's right to stop the goods: nor where the goods happen to be in a stage of their transit, under the direction of the consignee, and cannot be considered as having reached their final destination*(l)*: nor if the transit be complete, where [*110]

ceived an order to the defendants (wharfingers) to transfer the goods. The goods were accordingly transferred in the defendants books, and the vendee debited with warehouse-rent. But he immediately after becoming insolvent, the sellers gave notice to detain the goods. But, per Lord Ellenborough, "The goods having been transferred into the name of the purchaser, it would shake the best established principles still to allow a stoppage *in transitu*. From that moment the defendants became trustees for the purchaser, and there was an executed delivery as much as if the goods had been delivered into his hands." Of one parcel of the butters no such transfer had been made in the books by the wharfinger, nor was any act done by him to testify that he held the goods on the vendee's account; yet his Lordship held, "That the wharfinger, after the delivery of the order to him, was bound to hold the goods on account of the purchaser, and that the vendor's right to stop *in transitu* was gone."—The delivery of the note was sufficient, without any actual transfer made in the books.

(k) Dick *v.* Lumsden, Peake N. P. C. 188. Anonym. 3 Esp. N. P. C. 115.

(l) Holst *v.* Pownal and another, 1 Esp. 240. Trover by consignor, against the assignees of consignee (become bankrupt): and the ques-

the goods continue in the king's warehouses, for they are to be considered as still in the possession, and subject to the carrier's lien(*m*).

[*111] *So if the goods are under the custody of another, by a foreign attachment, or are seized by the sheriff on the road, at the suit of the consignee's creditor, it cannot defeat the consignor's right, if claimed by him(*n*); for the process can give the attaching

tion was, whether the voyage was complete at the time of the assignees having first obtained possession of the goods, she being then performing quarantine; it was held, by Lord Kenyon, "That she was to be considered *in transitu*, the voyage not being complete until she had performed the quarantine; and as the plaintiff's agent had given notice, and claimed the cargo before the completion of the voyage, he was of opinion, that the plaintiff had stopped the goods time enough to prevent the property from vesting in the assignees."

(*m*) Northey and another, assignees, *v.* Field, 2 Esp. 615. *Assumpsit* by assignees of the consignee of wine (for which he had accepted a bill), against the broker. The consignees became bankrupt after the ship's arrival, and the duties not being paid, the wines were removed into the king's cellars, whence they were afterwards sold at the public sale; and it was said, by Lord Kenyon, "That, in order to stop goods *in transitu*, the old rule requiring an actual possession to be obtained by the consignor, was much relaxed; a claim was sufficient. In the present case, the bankrupt had no title to the actual possession till the duties were paid; until *then* they were *quasi in custodia legis*. As the agent for the consignor, before the sale, claimed and endeavoured to get possession of the goods, that was a sufficient stopping, in his opinion, to secure the rights of the consignor."

Boehtlinck *v.* Inglis and others, 3 East 381, supr.

(*n*) Smith *v.* Goss, 1 Camp. 282. Trover by the consignors, against a wharfinger, to whom the goods had been sent to be forwarded, and whilst in his possession had been attached by process out of the mayor's court, at the suit of a creditor of the consignee. Defendant had refused to allow the plaintiffs to defend the attachment in his name, and judgment was finally entered up against him as a garnishee; and held by Lord Ellenborough, "That as the goods were merely at a stage upon their transit, they could not be considered as having reached their final destination when at the wharfinger's. The right of the consignor to stop *in transitu* cannot be defeated by the process of a

creditor no greater right than the consignee himself had.*(o)*

Neither is it reasonable that part payment should make a difference so as to prevent the *right of the consignor from attaching; for then some trifling sum, by way of earnest, would always be paid for that purpose. The only operation of a partial payment is to lessen the lien *pro tanto*, which the consignor would otherwise have upon the full value.*(p)* Until therefore an actual delivery the consignor may, upon the insolvency of the consignee, or other just cause, re-take his goods, upon re-payment of the sum which has been paid. [*112]

§ 9. *Price of carriage, how regulated.*

The same principles of policy which made carriers liable as public servants, induced the legislature to interfere also, to prevent fraudulent combinations for the purpose of charging exorbitantly for the carriage of goods; and as the clause, which was intended to operate with that intent, was contained in an act made for regulating the survey and improvenment of highways, but which statute has, at different times, undergone many innovations;

creditor, who can have no greater right than the consignee himself. The vendor's power of intercepting the goods is the elder and preferable lien, and cannot be superceded by the attachment, any more than it would have been by the general right of a common carrier to retain all his customers goods for his general balance, which had been decided against the carrier." Verdict for plaintiff.

Oppenheim *v.* Russel, 3 Bos. and Pul. 42.

(*o*) Northey *v.* Field, 2 Esp. 613, supr.

(*p*) Hodgson *v.* Loy, 7 Term R. 440, supr.

the section relating to the regulation of the price of carriage of goods seems to have become of doubtful existence or utility. It is therefore important to take a cursory view of the several changes which it has so undergone, and, if possible, rescue a measure intended by the legislature, and really capable of affording relief to trade, by preventing abuse in so very material an instrument of its prosperity.

[*113] *That its provisions still exist seems to have been acknowledged in a modern decision of great authority,(q) although no case is to be found which has called it immediately under the review of the courts: and upon looking into the several statutes which have recognized or re-modelled the stat. 2 & 3 W. & M. it will be found that in each, the section with which we are concerned has been acknowledged and preserved without alteration.

The first act of the legislature which affected that statute was the 7 Geo. 3, c. 5; that repealed so much of the several other acts there recited as related to turnpikes, and *inter alia*, 2 & 3 W. & M. "except so much thereof as relates to the rate or price for carriage of goods." Then followed the 8 Geo. 3, c. 5, which only repealed so much of the preceding act as related to the number of horses drawing certain description of waggons on the highways, and revived some regulations relating to highways in the weald of Kent, and city of Bristol. The last act which affected this statute was 13 Geo. 3, 78, which was made to explain, amend, and reduce into one

(q) By Lord Ellenborough, in Kirkman *v.* Shawcross, 6 Term R. 17. So in Harris *v.* Packwood, 3 Taunt. 264. infra.

act, the several statutes relating to the highways; and by sect. 83, repealed the two preceding acts, except such parts thereof as repealed any parts of former acts. From whence it appears, that the 24th section of the original statute 2 W. & M. continues unaltered *in any way, and in full force and [*114] effect; so that on complaint made to any justices, at their quarter sessions, (where the prices have been regulated according to the terms of that section,) any common waggoner or carrier, taking for the carriage of goods more than the rates and prices so set by the justices, would be liable to forfeit five pounds for such offence, to the use of the party grieved, and to be levied according to the directions of that statute.(r)

(r) Stat. 2 & 3 W. & M. c. 12, sec. 24. "And whereas divers waggoners and other carriers, by combination among themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade; be it therefore enacted, by the authority aforesaid, that the justices of the peace of every county and other place, within the realm of England, or dominion of Wales, shall have power and authority and are hereby enjoined and required, at their next respective quarter or general sessions after Easter-day, yearly, to assess and rate the prices of all land-carriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdictions, by any common waggoner or carrier; and the rates and assessments so made to certify to the several mayors and other chief officers of each respective market town within the limits and jurisdictions of such justices of the peace, to be hung up in some public place in every such market-town, to which all persons may resort for information; and that no such common waggoner or carrier shall take for carriage of such goods and merchandises above the rates and prices so set, upon pain to forfeit for every such offence the sum of five pounds, to be levied by distress and sale of his and their goods, by warrant of any two justices of the peace where such waggoner or carrier shall reside, in manner aforesaid, to the use of the party grieved."

*Even if there had been no such interference of the legislature, or if no rate has been fixed by the order of sessions, under the regulations which have been supposed to exist, the price of carriage, or premium for insurance, cannot be arbitrarily imposed, or made exorbitantly; carriers are not at liberty by law to charge whatever they please(s).

(s) Harris v Packwood, 3 Taunt. 264. Action against a common carrier, to recover the value of silk. The defendant relied partly on a notice which he had formerly given, that he should have a higher price for the carriage of that article; but chiefly on a recent advertisement by him, communicated directly to the plaintiff, announcing, that he would not be accountable for any package whatsoever above the value of twenty pounds, unless entered, *and* an insurance paid over and above the price charged for carriage, according to their value, and that no such insurance had been paid, although it was admitted that on the delivery of the goods the extra price for that article would have been charged. At the trial, Lawrence J. thought "That such premium could only be considered as paid (to the defendant) for an insurance against insurable risks, and not against loss by his own default of duty;" and plaintiff had a verdict. But upon the rule to enter a nonsuit, the court held, that as there was no proof of express negligence to take the loss out of the contract which had been made, the rule must be absolute. It was said also, that however inconvenient it was, from the days of Aleyn to the present hour, the cases have again and again decided, that the liability of the carrier may be restrained. "Carriers are not however at liberty by law to charge whatever they please. He is liable by law to carry every thing which is brought to him for a reasonable price, and not to extort what he will. It would be useless to pass any such statutes to limit the price of carriage, if a carrier be at liberty to charge whatever he pleases."

CHAPTER VII.

IN CASE OF SUIT.

§ 1. *Form of Action.*

THIS was for a long time a question much agitated among pleaders, and arose naturally out of the innovation upon the common law duties of carriers. Whilst their occupation was only considered a public duty, the breach was a tort, for which they were liable to an action on the case, founded upon the custom. But when they succeeded in establishing the existence of a contract, they became also subject to answer in an action of *assumpsit*, on the expressed or implied undertaking. Each of these modes of considering the question had its peculiar advantages and inconveniencies: If the action was laid in contract, it might be abated for non-joinder of all the parties; but it survived against the executor. If the *gravamen* was alledged in a breach of public duty, and liability to be founded on the custom; the ousting of the defendant of such pleas, and the joining a count in trover, where a tortious conversion of the property could be proved, together with a general verdict, were advantages of which plaintiffs were always eager to avail themselves; but as the principles on *which such advantages or disad- [*117]

vantages depended were sometimes confounded, the different views of considering particular cases gave rise to frequent doubts and disputes, and often involved the modes of remedy, and legal proceedings, in great uncertainty and increased expense.

The present usage sanctions the principles and adopts the advantages of both forms of action, by permitting the case to be considered either way, as arising *ex contractu* or *ex delicto*, according as the neglect of duty, or breach of more express promise, is meant to be relied upon as the cause of injury.(*a*) By this *means a multiplicity of actions,

[*118]

(*a*) Ross *v.* Johnson, 5 Burr. 2825, supr.

As the courts of K. B. and C. P. seem at present to be divided on the question, whether this action is to be considered as arising *ex contractu* or *ex delicto*; the former allowing it to be laid in either way, the latter requiring it to be laid only in contract, it may be useful to consider the several leading cases on which those judgments have been founded.

Govett *v.* Radnidge, 3 East, 63. Action against several, for so negligently, &c. loading a hogshead of treacle that it was staved, and thereby the treacle lost, to which *not guilty* was pleaded. Upon motion in arrest of judgment for misjoinder of parties, it was contended, that the cause of action arose *quasi ex contractu*; but, per Lord Ellenborough, "What inconvenience is there in suffering the party to allege his *gravamen*, if he please, as consisting in a breach of duty, arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise from the same consideration of hire. By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided, and the plaintiff, according as the convenience of his case requires, frames his principal count in such a manner, as either to join a count in trover therewith, if he have another cause of action other than the action of *assumpsit*, or to join with the *assumpsit* the common counts, if he have any other cause of action to which they are applicable. The only inconvenience which can be suggested

and the expense of useless pleas, are avoided; and the plaintiff, as his convenience requires, frames his principal *count, so as to join a count in trover [*119]

is, that by declaring in tort, the defendant is ousted of his plea in abatement; a plea, which, as it cannot be pleaded after a general imparlance, is seldom of much use in point of fact, and which, as every new defendant who may be successively brought forward and disclosed by successive pleas in abatement, may in his turn plead that there are still others, parties to the contract, who ought to be, and have not been, joined as defendants, opens a door to endless vexation and expense, as against the plaintiff in successive stages of unprofitable delay."—"We are of opinion, that the acquittal of one defendant in an action, founded, as this is, on neglect of duty, and not upon breach of promise, does not affect the right of plaintiff to have his judgment as against the defendant, against whom the verdict has been obtained." And this seems now to be recognised as law in the court of K. B.

So in Dickon *v.* Clifton, 2 Wils. 319. Case against a carrier, for negligently carrying malt. And, per Ch. J. Wilmot, "It is objected, that the first count is laid *ex quasi contractu*, and cannot be joined with trover; supposing it was so, yet I should lay no great stress upon old cases to this point, at this day. But I think the first count is laid to be *ex delicto* of the defendant, and as a misfeazance, which may undoubtedly be joined with trover. The true test, whether counts may be joined, is to consider whether there be the same judgment in both. I own that in many books it is reported, that trover and a count against a common carrier cannot be joined; but common experience and practice is now to the contrary. This is laid as a misfeazance, wherein there is the same judgment as in trover, and therefore the plaintiff must have judgment."

But in Powel *v.* Layton, 2 New. 369. Action on the case, in the form of tort, against one of several joint-owners of a ship, for not carrying goods safely, to which there was a plea in abatement and demurrer. There it was held, "That although the word *suscepit* is not used in the declaration, yet the nature of the charge is, that the defendant agreed to carry the goods to Sicily, and has failed in the performance of the agreement; and said, per Mansfield, Ch. J. "The duty of a servant, or of an officer, I understand; but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract. I suppose there there can he no doubt, (and indeed it is so stated, by Lord Mansfield, in Hambly *v.* Trott, Cowp. 375,) that if a common carrier accepts goods to carry, and then die, an action will lie against his executor. How is

therewith, in the one case, or the money counts in the other, according as he may have separate causes
[*120] of *action to which such counts are respectively applicable.

As the count in trover is now frequently introduced, it may be proper to consider when it may be successfully supported, and what will be evidence of a conversion.

The rule in this respect seems to be, that whenever an injury is sustained by the wrongful act of the carrier, then only trover may be supported, even if such act has been unintentional; as, if the carrier refuse to deliver the goods when he has them in his possession without just cause, or if his refusal arises from his having tortiously converted the goods, as by unpacking them and stealing; or even if he has delivered them by mistake to a stranger; in all such cases the refusal is evidence

that? Why, because the action is founded in contract." Indeed Lord Mansfield says, "that it must not be an action on the custom of the realm, which would be in tort, but it must be an action of contract. But the from of the action cannot alter the nature of the transaction; the form of the transaction is originally contract; and the circumstance of the action lying against the executor of the carrier shows that it is contract. How an action against a carrier on the custom ever came to be considered an action in tort, I do not understand, but it is so considered, and a count in trover is joined with it; and yet, though the non-performance of that which is originally contract may be made the subject of an action of tort, the foundation of that action must still be contract."

Boson *v.* Sandford, Salk. 44, supr. and 3 Lev. 258. Carth. 58. Skin. 278. And so in—

Dale *v.* Hale, 1 Wils. 282, supr. per J. Dennison, "The declaration upon the custom of the realm is the same in effect with the present declaration. In the old forms it is that the defendant *suscepit*, &c. which shows that is *ex contractu*, and this authority was cited by Lord Kenyon, in Bnddle *v.* Wilson, 6 T. R. 373.

of conversion.(b) *But when it arises from an inability to deliver the goods, as when they have been lost or destroyed by accident, however he may be liable to answer in another form of action, he cannot be liable in this; and so if he assert (falsely) that he has delivered the goods, it cannot be construed into a conversion(c), nor where the

(b) Anon. Salk. 655. Per. Cur. Pasch. 7 W. 3. B R. Trover lies not against a carrier for negligence, as for losing a box, but it does for an actual wrong, as, if he break it to take out goods, or sell it; and therefore denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he denied to deliver it, it is good evidence of a conversion. Per Trevor, Ch. J.

(c) Ross v. Johnson, 5 Burr. 2525, supr.

Youl v. Harbottle, Peake, 49. Trover for goods, which defendant, master of a Gravesend packet-boat, had delivered under a mistake to a stranger, and, per Lord Kenyon, "I agree, that when a carrier loses goods by accident, trover will not lie against him; but when he delivers them to a third person, and is an actor, though under a mistake, this species of action may be maintained."

Dewell v. Moxon and another, 1 Taunton, R. 391. Action against the owner and master of a vessel, upon a contract to carry goods free of freight, made by the master, without the owner's knowledge, with a count in trover for the refusal to deliver the goods; the court were unanimous that the action of trover would well lie in this case for the detention. A new trial was however granted to let in more of the facts respecting the contract.

Anon. 4 Esp. N. P. R. 157. Said, per Lord Ellenborough, "That what begins in contract, a non-performance of what the party so undertakes to do, or a bare non-delivery of what he undertook to deliver, is not to be considered as of itself amounting to a tortious conversion. This principle was recognized some time ago in K. B. in an action against a carrier for not delivering goods If a carrier says he has the goods in his warehouse, and refuses to deliver them, that will be evidence of conversion, and trover may be maintained, but not for a bare non-delivery without any such refusal."

"Denial is no evidence of a conversion, if the thing be really lost by negligence; but if that do not appear, or if the carrier had it in his

goods have in fact *never reached him, having been delivered to his servant, by whose negligence his master has been prevented from receiving them: since this cannot be construed into any conversion by him.*(d)*

The declaration against a carrier for the loss of goods need only state the nature of the goods, with a certainty of description to a common intent; thus a carrier's pack has been held a sufficient certainty; and so, where the declaration was for so many *sets of gold buttons*, and a set of Turkey *stones and garnets;* for to such as are conversant
[*123] with those things a set is intended to be *well known, and in what number the precious stones are usually placed in such sets.*(e)*

custody when he refused to deliver it, it is good evidence of a conversion. But the carrier may give in evidence the detaining of the goods for carriage, or that the goods were stolen, for then he is guilty of no conversion, though he is liable in an action on the custom." Buller, Ni. Pri. 45.

Attersol *v.* Briant, 1 Camp. N. P. R. 409. Trover, for bricks delivered to a carrier, and which he falsely asserted to have delivered; and said, per Lord Ellenborough, "Although the defendant might have been guilty of a tort, respecting the bricks, it did not appear that he was guilty of the specific tort mentioned in the declaration. The action was therefore misconceived."

(d) Taylor *v.* ——— 2 Lord Raym. 792. Per Holt, Ch. J. at N. P. at Hertford, "If goods be delivered to a carrier, and he does not deliver them according to the direction given him, upon demand and refusal, trover lies against him, or an action upon the case lies against him upon the custom. But if the goods be delivered to a servant of the carrier, or to his warehouse-keeper, and they are not delivered, &c. an action of trover does not lie against him without an actual conversion by him."

(e) Chamberlain *v.* Cooke, 2 Ventr. 78. So held in a declaration against a common carrier; and in Herbert *v.* Lane, Styl. 370.

§ 2. *Parties to sue.*

It being a general rule of law that such parties only can maintain an action in whom the legal interest is vested; and as we have seen that the property by delivery to the carrier becomes absolutely vested in the consignee, it follows, that the action can in general be brought only in his name. The only case in which the consignor can appear as plaintiff is where that right remains reserved to him under any special contract with the carrier, or where it is brought in prosecution of the right which he has by law of resuming the property whilst *in transitu*; in neither case will the carrier be allowed to question his title to the goods; and so if the consignor has paid the carriage.*(f)*

§ 3. *Parties to be sued.*

It having been determined in the king's bench that the action may be founded either in tort or contract, whilst the court of common pleas only admit it to be maintained in the latter form, the rule, as to joining parties as defendants, will *follow the general principles of those actions, or the practice of the particular court in which the plaintiff sues.*(g)* Hence if the *gravamen* be alleged in [*124]

(f) Dawes *v.* Peck, 8 Term R. 330, supr.
Dutton *v.* Solomonson, 3 Bos. and Pul. 581. Anon. 3 Esq. N. P. R. 115, supr.

(g) Govett *v.* Radnidge, 3 East R. 63, and Powell *v.* Layton, 2 New R. 369.

a breach of contract, or even if in the common pleas the declaration be worded so as to appear in tort, yet as the court have declared that the form of action cannot alter the nature of the transaction, the defendants may take advantage of non-joinder of all the parties by a plea in abatement. But this is the only mode, for it cannot affect the proceedings after an imparlance, nor under the general issue.*(h)* When the principal count has been framed upon an alleged neglect of duty, and not upon any terms of contract, it is usual to add a count in trover, if there is any ground to support it. And in such case, if some of several defendants are found guilty, and others acquitted, the plaintiff will nevertheless be entitled to judgment.

§ 4. *Carriers suing inter se, or other persons.*

WHERE several carriers are co-defendants, and judgment is executed against one only, there seems no doubt but that the action would be so far considered to be founded in contract as to make the others liable to contribution, notwithstanding the form of the action may have been laid in tort. But [*125] where the injury arises from the *gross negligence or malfeazance of such individual he cannot compel the others to contribute.*(i)*

(h) Rice *v.* Shute, 5 Burr. 2611. and Abbott *v.* Smith, 2 Bl. R. 947.

(i) Merryweather *v.* Nixan, 8 T. R. 186. Action on the case for a contribution to the sum recovered in another action against plaintiff and defendant for an injury done by them to a reversionary estate in a mill; the whole damages having been levied on the plaintiff; and, per

A carrier has such a special property in the goods whilst in his possession, that he may maintain trover(*k*) against any one detaining them, or support an action for an injury done in respect of such goods, upon a right of possession in himself, which is good as against all the world, but the consignee or the consignor pursuing his right of stoppage *in transitu*.

Where a carrier has made himself liable to the owner by a misdelivery, and has paid the amount, although he may maintain an action against the party receiving the goods, as for money paid for his use, he cannot recover as for goods sold and [*126] delivered to him.(*l*)

§ 5. *Evidence.*

It being laid down as a general rule, that no other acts but those recognised by law will exempt the carrier from his common law liability, since it

Lord Kenyon, "There could be no doubt but that the nonsuit in this case was proper He had never before heard of such an action having been brought where the former recovery was in tort."

(*k*) Taylor *v.* ——— 2 Lord Raym. 792. "If a common carrier has goods delivered to him to carry to a place, and a stranger takes them out of his possession, and converts them to his own use, an action of trover and conversion lies by the carrier against him, for he has a special property in the goods, and is to give satisfaction to the owner for them." Per Brampt. Ch. J. Goodwin *v.* Richardson, Roll. Abr. 5.

And cited in Arnold *v.* Jefferson, Lord Raym. 278.

And Wilbraham *v.* Snow, 1 Ventr. 52.

(*l*) Brown *v.* Hodgson, 4 Taunt. R. 189. Action for goods sold, and the money counts. Plaintiff, who was a carrier, had delivered the goods by mistake, and paid the consignee the value of them, and it was held, that as the carrier was bound to pay it, this was not the case of a man officiously paying money for another, and therefore the action may be supported upon the count for money paid.

is not an answer to the absolute undertaking arising out of his public employment; such facts are immaterial to be proved. The injury itself is a sufficient proof of negligence, for it is said, "every thing is a negligence which the law does not excuse."*(l)*

As this responsibility attaches from the moment the goods are received by the carrier or his authorized agent, a servant employed to deliver them to him is a competent witness to prove such delivery. On the other hand, a book-keeper, or any appointed receiver of goods, is such a servant of the carrier as may be admitted to prove the publication of
[*127] a notice, and of the terms under which the *goods were received.*(m)* He is often so of necessity, be-

(*l*) Dale *v.* Hull, 1 Wils. 281, supr. Aston *v.* Heaven, 2 Esp. N. P. R. 533. Israel *v.* Clark & al. 4 Esp. M. P. R. 259, supr. 2 Camp. N. P. R. 79.

(*m*) Spencer *v.* Goulding & al. Peake, N. P. C. 128. Action against carriers for not safely conveying a parcel from Worcester to London. And the question being, whether or not it was delivered according to the direction, the defendants called their book-keeper at Worcester, and upon objection thereto, Lord Kenyon thought him a good witness *of necessity*, without any release. Vid. Adams *v.* Davis, 3 Esp. N. P. R. 48.

"A party interested will be admitted for the sake of trade and the common usage of business. Therefore a porter shall be evidence to prove a delivery of goods." Buller Ni. Pri. 289. So the carrier himself is often a witness of necessity.

As, "In an action against a hundred by the master, being a carrier, for a robbery committed on his servant, in the absence of the master, *quere* whether the master, being the plaintiff in the action brought, may be a witness to prove that he delived the monies of which his servant swears he was robbed, for this might be proved by any other, and no person is to be a witness in his own cause, but for necessity; as if he himself had been robbed, although that he was plaintiff yet he might be a good witness to prove himself to have been robbed, and of what

ing the only agent on the part of the carrier interfering in the contract, and need not be *released [*128] unless where the injury arises from his own negligent act.(*n*) So also the master of a *ship, not [*129] having any immediate interest as part-owner, or otherwise, may be called as a witness, if the plaintiff will give him a release; for the proceedings in that action can neither be brought against him as evidence of his own negligent acts, nor can it ex-

sum, or things; and also to prove that he gave notice to the next vill, and levied hue and cry, for this is of necessity for default of other proof. But as to proving the delivery of the money to his servant before the robbery, and before he set out on his journey, this might be proved by any other as well as by him; although it was objected that it is not safe nor usual for men to call witnesses when they deliver money to carry on a journey, on account of the danger of discovery; and for this reason, (*per curiam,*) against my opinion it was ruled that he should be received as a witness." Per Rolle, J. 2 Abr. 685. Mic. 1650. Bennet *v.* Hundred of Hartford.

So it was ruled by Chambre, J. Monmo, Spr. Ass. 1802. MSS. Porter *v.* Hundred of Ragland. Where a mob had robbed the plaintiff's barge of corn, but his servant could not prove the quantity on board, the plaintiff was admitted evidence to prove that fact. And in—

Barker *v.* Macrae, 3 Camp. N. P. R. 144. Action for money had and received, having been sent from plaintiff by the carrier to pay a particular debt, but delivered by mistake to another creditor of the plaintiff's with whom he also had dealings; and in an action to recover this back, having been twice paid, Lord Ellenborough said, "I think the carrier is a witness of necessity, and may be examined without a release." Cobden *v.* Bolton, 2 Camp. N. P. R. 108, supr.

(*n*) Spitty *v.* Bowens, Peake, N. P. R. 52, a. Case for negligence, whereby a barge laden with the plaintiff's corn was sunk, and the corn much injured; and Lord Kenyon thought that the master of the barge might be called to prove the accident, having been released by the plaintiff; because the record in this cause would not be evidence in an action brought by the witness for damage done to his barge. But, in Protheroe *v.* Elton, id. 83, it was considered that the owner could not be called to prove that the ship was staunch and sea-worthy without a release; because if otherwise, he would himself be liable on

tinguish the liability of the owner to answer to the injured party.(o)

To prove the terms of a notice on a board fixed in the wall of an office an examined copy is sufficient.

When the carrier acts as the servant of another in conveying money, he is of necessity a witness to prove the payment, although he may himself be liable for a misdelivery, and that without a release; so in cases where the carrier has been robbed, and sues the hundred on the statute of Winton, the servant, or if he cannot speak to the extent of the goods robbed, the carrier himself may be examined to prove that fact.

§ 6. *Payment of Money into Court.*

The payment of a sum of money into court seems to be considered an admission of the contract [*130] as laid in the declaration;(p) and as that *com-

the implied warranty on his part, that the ship was staunch, and so far he was interested in the verdict.

Lay *v.* Holock, Peake, N. P. C. 100. *Assumpsit* against the owner of a ship for injury occasioned to corn by the vessel not being tight and sea-worthy; to prove which, the master was called, plaintiff having released him; and said, per Lord Kenyon, "He has no immediate interest; the record in this cause would not be evidence for or against him in an action brought against him; and if it should turn out that the ship was lost by the negligence of the master, still the present defendant is liable to the plaintiff Therefore taking it either way he is a witness."

(o) Vid. note (m) 127, supra.

(p) Yate *v.* Willan, 2 East R. 133. and Hutton *v.* Bolton, cited 1 H. Bl. R. 301, supr. In the first of these cases, it was said, The payment of money into court, on a special count, admits the contract as there laid, but leaves the amount of the damages incurred by the breach of it open to dispute. But it was said by Ashhurst, J. in Cox *v.* Parry, 1 T. R

monly involves a general liability, the carrier will thereby be prevented at the trial from proving that his contract was conditional, and therefore that he

464. "He has admitted that the plaintiffs are entitled to maintain their action on the policy to the amount of that sum. But he has admitted nothing more. He does not, by paying money into court, vary the construction and import of the policy, so as to entitle the plaintiffs to recover beyond that sum. And in Clarke *v.* Gray, 6 East R. 570, it was said, upon the authority of the last case, That the case of Yate *v.* Willan cannot be supported in its full extent; for although the payment of the money in that case did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision as to the amount of damages to be recovered in case of loss, which existed in that case, and exists also in this."

I have stated the law to be as in the text, with great deference and hesitation: and where the law is to be extracted from conflicting judgments, it is perhaps equally the duty of an enquirer to doubt where there seem just ground, as to refer to great authorities. The cases of Yate *v.* Willan, and Clarke *v.* Gray, are evidently at variance with each other. It is clear, that if the contract be written and set forth in the declaration, what was said by Ashhurst, J. (in Cox *v.* Parry, which was on a contract in writing, an insurance policy) does not affect the rule laid down in Yate *v.* Willan. For the payment of money into court cannot prevent the court or jury from judging of the construction and import of the terms of the contract, when set forth in the declaration, and is the only one in question. But if the law be as stated in Clarke *v.* Grey, that though the payment does admit the contract as stated in the declaration, yet that it does not admit a contract incompatible with the restrictive povisions of the conditional contract set up at the trial by the carrier; the court and jury will then have to decide between the contract in the declaration, and another set up in evidence; which is in effect an issue which of the two contracts really existed, and which of the two was intended to be acted upon by the carrier; an issue which would arise more simply and more technically by the carrier's denying at once the contract as laid in the declaration, and which would be more advantageous to him; since if he succeeded in negativing the contract declared on, the plaintiff would be nonsuited. It should seem therefore that if the contract, as alleged in the declaration, be once admitted by the payment of money in court, it cannot be competent to the defendant to limit the amount of damages by giving

incurred only a limited responsibility. *Another reason why the payment of a sum into court should not confine the liability of the carrier within the limits of his own notice, is that it cannot be known by what rule the jury will measure the amount of damages.(q) The demand is not for a certain sum arising out of any specific contract, like loss on a [*132] valued policy, but the *damages remain unliquidated, and the jury may exercise their discretion as to the extent of loss, considered partly in reference to the value of the goods, partly in respect of any injury accruing in consequence of such misfeazance or breach of contract.

§ 7. *Damages.*

With respect to the amount of damages to be recovered; this depends upon the extent of the carrier's liability being established to answer for the whole value, or only to the extent to which he has succeeded in limiting his responsibility by the terms of his notice. In the former case the plaintiff will be entitled to recover the entire actual value of the goods lost, or damages proportionable to

in evidence a contract totally different in its terms and consequent liabilities—*quære igitur*—.

(q) Fail *v.* Fickford, 2 Bos. & Pul. 234. *Assumpsit* against a carrier to recover the value of a quantity of tea, lost by the sinking of the defendant's barge. And on a motion to be allowed to pay the invoice price into court, it was refused, inasmuch as it could not be done without violating the principle which had been established as the rule upon this subject, "not to allow money to be paid in, in cases of uncertain damages." Vide Tidd's Pract. 408. Ed. 1. 8 T. R. 49.

the injury sustained.(r) If also the declaration allege any particular damage or inconvenience suffered, independent of the loss, and arising in consequence of the breach of duty or contract of the carrier, this, like all actions arising from the misfeazance of another, will be proper *matter for [*133] the jury to consider, and give proportionate damages.

It may also be observed that where no fraud has been proved on the part of the carrier, the presumption will be against the demand of the plaintiff, unless he clearly prove the value of the goods lost.(s) But if the conduct of the carrier be at all tinctured with fraud, the presumption will be in favor of the plaintiff's demand.

§ 8. *Limitation of Suit.*

WHETHER this action be considered as founded in contract or tort, the remedies by actions upon the case, or *assumpsit*, still fall within the general class of actions, which in the statute of limita-

(r) Said by Buller, J. in Hutton & ux. *v.* Bolton, cited 1 H. Bl. 229. "This is an action of *assumpsit*, and the goods are stated to have been of a specific value. The declaration does not state any particular damage or inconvenience in consequence of and independent of the loss; and therefore the plaintiff cannot recover beyond the value of the goods in question, for which reason the declaration does not differ from the common case of goods sold and delivered. It is a declaration on the face of it only for the value of the goods."

(s) Clunnes *v.* Perrey, 1 Camp. 8. *Assumpsit* for goods sold by a liquor merchant; and the only proof as to the contents of the bottles delivered being by the plaintiff's servants, who could not speak to the quality of the contents; the jury, in the absence of all fraud, were di-

tions(*t*) are called *actions upon the case*, and must therefore be prosecuted within the period prescribed by that statute, which limits the commencement of such actions to within six years from the time such causes of action accrued.

§ 9. *How far a Carrier, stealing Goods, is guilty of Felony.*

It is a rule of common law, that to constitute fe-
[*134] lony, the property must be taken from the *actual or constructive possession of the owner. Hence where property is delivered into the possession of any one for a particular purpose, a tortious conversion of it may be a fraud or breach of trust in him, but it cannot make him guilty of felony.(*u*) The possession however which has been so imparted to him from the owner may be extinguished by an act which *eo instanti* determines the authority and possession so communicated; and then any act which would be felonious in another becomes equally so in him. Thus, if when the goods have been carried by him to the appointed place, he afterwards

rected to presume them filled with the cheapest liquor in which the plaintiff dealt. Armory *v.* Delamirie, 1 Str. 505.

(*t*) Stat. 21 Jac. 1. c. 16. § 3.

(*u*) 3 Inst. 102. 9 Staund. 25. Kely, 35. 1 Roll. Abr. 73 "If a man deliver goods to a carrier to carry to Dover, and he carries them away, it is no felony; but if the carrier have a bale or trunk with goods delivered to him, and he breaks the bale or trunk, and takes away the goods *animo furandi*, or if he carries the whole pack to the place appointed, and then carries it away *animo furandi*, this is a felonious taking, by the book 13 E. 4, 9. Co. P. C. p. 107." Hale P. C. 504.

carry them away *animo furandi*, it is a felonious taking.

So if he unpack the goods, the very act itself determines the trust possession, and the subsequent taking is felonious, for the thing committed to his trust is single and entire.*(x)*

So if he sells or delivers over the bale to another although it seems to be a tortious conversion rather than a felony; yet if he received the goods into his possession with such an intent, or is, after delivery to another for the purpose of felony, *concerned in [*135] the subsequent stealing, &c. the whole offence is so entire that it would be considered a felony in him, either upon the ground that the first obtaining of the goods was under a fraudulent pretence, or that the subsequent acts made him an accessary to the felony. And this distinction seems to have been constantly recognised by the courts; although it might seeem that the *quo animo* with which he originally received the goods, would be the true principle of determining the degree of criminality of any action.

So if a hackney-coachman detain and convert goods left in his coach, or a hired porter embezzle parcels delivered to him to be carried, it is considered felony, if the original detention be done *animo furandi*, or they have subsequently purloined the goods.*(y)*

(*x*) 21 H. 8. pl. 14. Dalton, c. 102. 1 Hawk, c. 33. § 5.

(*y*) In Wynne's Case, Leach's C. C. 413. A box was left in a hackney-coach, and all possible means afterwards used to discover the coachman. After a considerable time he was apprehended, and the box was

*The Legislature has however removed all doubt as to the crime being considered a breach of trust, or positive felony, by the help of positive statutes, in respect of the Bank, Post-office, and other cases [*137] of embezzlement by servants having *valuable pro-

found in his possession, but the hasps had been forced off, and several articles contained therein were missing. At the trial the judge (Mr. Baron Eyre) observed, "that as the prisoner had not originally taken possession of the property himself, but had had it thrown upon him by the negligence of the prosecutor, no felonious intention could be supposed to exist in his mind at the moment the property was first acquired; and although the subsequent keeping it till it was advertised was a breach of moral duty, it could not of itself be legally considered as a criminal conversion." He therefore directed the jury to acquit the prisoner if they thought he had detained the box merely in hope of a reward being offered for its restoration; but if they were satisfied he had opened it, not merely from idle curiosity, but with an intention to embezzle any part of its contents, and had actually taken the goods mentioned in the indictment, it would become a matter of legal consideration, whether a person so guilty should not be reached as a felon." The jury found the prisoner *guilty*, but the judgment was respited. It was however afterwards approved of by the judges, and he received sentence of transportation for seven years.

So Sear's Case, cited ibid. The hackney-coachman had opened a parcel of calico left in his coach, and had taken off three yards from it, and he was convicted of felony, and received sentence of imprisonment for six months, by virtue of the 5 Anne, c. 6. & 19 Geo. 3. c. 74. § 3. So Rex *v.* Lamb, Old Bail. Sess 1694, cited 2 East, c. 16. § 99, from the MSS. of Mr. Serj. Foster, where a coachman took and converted to his own use a trunk left in his coach, and it was held felony; "for he must have known where he took up the gentleman and his trunk, and where he set him down, and therefore he ought to have restored it to him."

At Old Bailey Sess. Mic. T. 1701. The prosecutrix had trusted a bundle to a porter to carry, and went with him, and in going he ran off with it; and being taken, and tried for the felony on this fact; Holt, Ch. J. directed the jury, "that if they thought the prisoner opened the bundle and took out the goods it was felony." But another ground is stated 2 East, P. C. 698, namely, that all the circumstances of the case showed that the porter took the bundle at the first with an intent to steal it. Leach's C. C. 415.

perty intrusted to them ;(z) in which cases, such embezzlement is expressly declared so be a felony.

(z) Breaches of trust with respect to servants of the Bank made felonies by 15 Geo. 5. c. 13. § 12. Servants of the Post-office by 5 Geo. 3. c. 25, § 17; & 7 Geo. 3. c. 50, § 1. Servants of bankers, merchants, and others by 39 Geo. 3. c. 85. And with respect to bankers, merchants, brokers, attornies, or agents of any description whatsoever, by 52 Geo. 3. c. 63. Leach's Crown Cases, 31. 106. 849. 1032. Hassel's Case, id. 4. Waite's Case, id. 31.

CHAPTER VIII.

OF THE DUTIES AND PRIVILEGES OF INN-KEEPERS.

*SINCE it is the object of the present inquiry to consider inn-keepers only as special bailees by the custom of the realm, and the liabilities attached to such an occupation; they will here be treated of in reference to the particular duties and privileges incidental to a situation which is regarded by the common law, from motives of policy, as a public employment.(a)

(a) The great case upon this subject is Calye's Case, 8 Coke R. 63, being a strict commentary upon the words of the original writ, which in such case is to be considered the ground of the common law. From this and the authorities cited it may be collected.

1st. It ought to be a common inn, and not intended where one merely lodges another upon request. And whereas the writ by the recital *infra hospitium ejusdem*, B. intends that the defendant keeps such *hospitium commune*, the plaintiff must *declare* that the defendant keeps such a common inn.

1. Roll. 2d. 3, 4. Dyer, 266. Fitz. Hosteler, 1 & seq. Doct. & Stud. 137, b. 3. Keh. 73 & pl. al.

2d. It appears that inns are instituted for passengers and wayfaring-men, so that a friend or neighbour shall not have this action. Ibid. 2. Br. 254.

3d. He is liable only for things *infra hospitium*. Ibid. 4 Leon. 96.

4th. He shall not be charged unless there be a default in him or his servants, but it is no excuse to say that he delivered the key of his chamber to the guest, or that the latter did not commit the goods to him. But he is excused if the goods are stolen by the servant or companion of such guest, or if the fault is in the guest. Moor, 78. 158. Cro. Eliz. 285. Salk. 18.

5th. The liability extends to all goods by the loss of which great damages arise to the guest, as deeds, &c but the declaration shall be spe-

§ 1. *Who are Inn-keepers.*

*An inn is defined to be a house kept open for the reception and entertainment of all comers, for gain, *(b)*; and is distinguished from an ale-house, in that the former existed long before, and independent of any excise, or other statute laws, which have entirely controlled and regulated the latter, ever since the time of Magna Charta.(c) *The one has at all [*146] times been erected without the license of the king, not being considered a franchise, but an independent trade, instituted for the convenience of passengers and wayfaring persons; whereas the other is always established by a license, to be granted in the discretion of the justices at a general meeting; is confined to a particular place; and continues only for a limited period.

Since the excise laws have been extended to so many articles of entertainment, these occupations

cial; and it does not extend to any personal damage of the guest, but only to his moveables. 2 Roll. 58. Dyer, 5 pl. 2 Yelv. 68.

"A man may erect an inn without any license from the king, because it is not any franchise, but only a trade, like an alehouse." For there is not any record in modern times by which it appears that the king ever granted any license to inn-keepers. 2 Roll. 84.

(*b*) "If a man puts a sign at his door, and harbours guests, that shall be deemed a common inn, and he shall be chargeable for the goods of those he entertains, if they happen to be lost," per Ley. Ch. J. Trin. 21 Jac. 1. 2 Roll. R. 345. "And yet, if after taking down the sign he uses to harbour travellers, it shall be deemed a common inn as well as if he had a sign." Ibid. 348.

(*c*) Mag. Chart. 24, c. 5, regulates the assize of wine, which, if exceeded by any tavern-keepers, the mayor and bailiffs may shut up the house; and also prohibits the selling wine without license.

1 Hawk. c. 78. § 1. Dalt. 24 56. 133. Blackerby, 170—Burn. tit. Alehouses 36. Stat. 48. Geo. 3. c. 143.

have, in modern times, been generally united; and it seems to be agreed that inn-keepers ought now to have license, and be bound by the same recognizance for keeping order as ale-house-keepers, and their conduct is equally subject to be inquired into by the justices. They are also liable to be indicted and fined for harbouring thieves, suffering disorders, charging exorbitantly, or keeping their inn in an unfit situation, or in opposition to another ancient inn. Still, however, every inn is not necessarily an ale-house, nor every ale-house an inn. An inn cannot use a common selling of ale without being subject to the duties and control of the excise laws, and becoming thereby more immediately under the cognizance of the justices: and if an ale-
[*141] house *lodges and entertains all travellers indiscriminately, for gain, it is also within the common law liability of an inn. But where a man lets his house out to lodgers, although he finds them meat and drink, receives their horses, &c. yet if he makes a previous contract for this purpose, and stipulates for his own price, refusing whom he pleases; such person is not within the meaning of the term inn-keeper.*(d)*

(d) Parhurst *v.* Foster, Salk. 387. 1 Ld. Ray. 479, and 12 Mod. 254; & Carth. 417. Trespass against a constable for quartering a dragoon upon plaintiff, who lodged strangers coming to Epsom to drink the waters, and dressed their victuals at so much per joint, and found beer, and supplied the horses of his lodgers with stable-room, hay, &c at a stipulated rate; and the court held it to be too plain that he was not an inn-keeper to give any reason. Calye's Case, supr, 4 resol.

Clayton 97. Com. Dig. tit. Action on case for negligence, B.

So, "if an attorney hires a chamber in an inn for a term or so, or a

§ 2. *Who is to be considered a Guest.*

WHERE a person comes to an inn, and is accepted as a guest, the liability of the inn-keeper attaches, whether or not he be fully informed of the property of the guest; and it is not altered or released by the guest going away for a time, if the inn-keeper have any continuing profit from the property remaining under his charge, as a horse *left [*142] in his keeping.(e) But if the goods be such that he can derive no profit from their being left in his

man boards or sojurns in an inn upon a special agreement, the inn-keeper is not answerable." Latch. 127.

(e) York *v.* Grindstone, Salk. 388; & Ld. Ray 866. Replevin for a horse, for taking and detaining of which the defendant avowed as a common inn keeper; and upon demurrer, held, that the inn-keeper may detain without making any previous demand. That where a traveller comes as a guest, the inn-keeper is obliged to accept the horse, and is not to consider whether the guest who brings them is the owner, or not. And all the judges, except Holt, held, "That if a man set his horse at an inn, though he lodge in another place, that makes him a guest, for the inn-keeper gains by the horse, and therefore makes the owner a guest though he was absent. Contra of goods left there by a man, because the inn-keeper has no advantage by them." Sir W. Jones, on Bailments, 93, et seq.

Similar to this rule was that of the civil law, "Maxima utilitas est hujus edicti quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere. Neque quisquam putet graviter hoc adversus eos constitutum: *num est in ipsorum arbitrio ne quem recipiant*, et nisi hoc esset statutum materia daretur cum furibus adversus eos quos recipiunt coeundi; cum ne nunc quidem abstineant hujusmodi fraudibus." Ulp. D. 4. 9. 1 & 3. That part of Ulpian's reason "*nam est*, &c." includes an option of receiving or refusing guests, in which the Roman *caupones* differed from our inn-keepers, the latter being liable to an action (or indictment and fine, 4 Bl. Com. 167) if they refuse, without an adequate reason, to admit and accommodate travellers. Id. 95. not. Dalt. c. 7.

By the ancient law, the first day the guest was called a *traveller* the second a *hogenhind*, and the third a *menial* servant, for whom the host was answerable as for his own menial servants. Latch. 88.

possession, he is then in the situation of any *other bailee for hire, and only answerable for ordinary negligence.(*f*)

For it is said that the obligation arises in consequence and in consideration of another gainful contract; and although the inn-keeper be not paid in money for securing the traveller's trunk, yet the guest *facit ut faciat*, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe, and the custody of the goods may be considered as accessary to the principal contract; the money paid for the apartments, &c. as extending to the care of the goods. Hence it has been decided, that the mere leaving his horse at an inn, though the owner never went in, constitutes him so far a guest that the common law liability arises, and the inn-keeper is compellable to receive the horse if he has convenience for him. So also if the servant only is lodged in the inn, and is robbed, the master may maintain the action.(*g*)

[*144] *It has been long holden, that a soldier quartered is also a guest, the only difference between him,

(*f*) Jelly *v.* Clark. Cro. Jac. 188. Plaintiff came to an inn with a hamper of hats, and went away, leaving them there two days, and in his absence they were stolen. Adjudged that he should not have an action against the inkeeper, "because at the time of stealing he was not his guest, and the defendant had no benefit by keeping the hamper, therefore he shall not be charged for the loss of it in his absence; but it would have been otherwise, if the guest had returned the same night (—Moore 877.) And if the host had promised to keep them safely, he might have been answerable upon such special promise."

(*g*) Beedle *v.* Morris. Cro Jac. 224. Action on the case upon the custom against an inn-keeper, by the plaintiff, whose servant was lodged at the defendant's inn, and whilst there, robbed of a bag of money belonging to the plaintiff, and he had judgment. Upon motion in arrest of

(by the common law,) and any other guest, is, that the inn-keeper is controlled in the rate of his charges for receiving and entertaining him.(*h*)

§ 3. *Extent of Inn-holders Liability.*

An inn-keeper is bound to make restitution for the property of the guests, whether damaged in his inn, or stolen out of it, by any person whatever. So if his servants or inmates rob his guests; for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence will be regarded an implied consent to the robbery. "Rigorous as this law may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private *considerations ought to yield; [*145] for travellers, who must be numerous in a rich commercial country, are obliged to rely almost implicitly on the good faith of inn-holders, whose education and morals are usually none of the best; and who might have frequent opportunities of associating with ruffians or pilferers; while the injured guest could seldom or never obtain legal proof of such combination, or even of their actual negligence,

judgment it was objected, that the action ought to have been brought by the servant. But it was held "that the master might well have the action, and that it had been so resolved before these times."

(*h*) It seems he has this privilege only during fourteen days. Com. Dig. Action on the case for negligence, B. 1. after this time it seems the inn-keeper is like one who has lodgers assigned him per *hospitatorem domini regis*, and so is not answerable like a common inn-holder. Dyer, 158, in marg. Roll. Abr. 2. D. 4.

if no actual fraud had been committed by them. In all such cases however it is competent for the inn-holder to repel the presumption of his knavery or default, by proving that he took *ordinary care*, or that the force which occasioned the loss or damage was truly irresistable."(*i*)

So the inn-keeper may show that the robbery was committed by the servant or companion whom the guest brought with him; but he cannot relieve himself from this general liability by any plea of sickness, or even of insanity,(*k*) at the time of the loss.

The same principles of policy and commercial convenience, render him liable to an action for *refusing to receive a guest, without adequate reason; and no other excuse will be deemed sufficient but that his house is already full; for his occupation is for the public benefit, and not to be withheld at his caprice.(*l*)

[*146]

(*i*) Sir W. Jones on Bailments, 95.

(*k*) Cross *v.* Andrews, Cro. Eliz. 622. Action against an inn-keeper, on the custom of the realm, for loss of goods; plea, that at the time the plaintiff lodged, the defendant was sick and of non-sane memory; but adjudged for plaintiff. "For the defendant, if he will keep an inn, ought at his peril to keep safely his guest's goods; and though he be sick, his servants then ought carefully to look to them."

(*l*) Bennet *v.* Mellor, 5 Term R. 273 Case against an inn-keeper, for goods stolen out of an inn; the plaintiff's servant had requested the defendant to take care of the goods until the next market day, which was refused by his wife, the inn being very full of parcels: the servant staid to refresh himself, during which time the goods were stolen from him; and said, "That if the defendant had taken the goods upon that request, he would have been only liable as a bailee; but the cause of refusal, if true, was a good excuse; if false, the inn-keeper was liable to an action for refusing. But as the proposal was not accepted the case stood upon general grounds. It is clear that the goods need not be in

*So neither can he impose unreasonable terms upon his guests, although the remedy for a gross overcharge could perhaps only be found in the determination of a jury, as it does not appear to be a matter within the cognizance or summary power of the justices; it is however said, that they may be indicted and fined for charging exorbitantly.(*m*) But it is expressly provided by statute, that the inn-keeper will not be allowed to detain the goods of his guest, unless he furnish him with an account, in writing, of the particular items of his reckoning, or if he sell liquours, &c. in unmarked measures.(*n*)

A horse or carriage put up at an inn is not liable [*123] to be seized as a distress for rent, but it is otherwise at a livery stable.(*o*)

the special keeping of the inn-keeper to make him liable; if they be in the inn, that is sufficient to charge him; and all the authorities agree that it is not necessary to prove negligence in the inn-keeper. And when the plaintiff's servant was sitting in the inn, with the consent of the inn-keeper (for the latter did not object to receive him,) he was in the same situation as any other guest, and entitled to the same protection for his goods."

It seems doubtful in what way he may be punished in case of refusal, or other improper behaviour. It was said by all the justices, "That if a common hosteler will not lodge me I shall not have action against him, but I shall complain to the ruler of the vill, and *he* shall have direction of it." 5 Ed. 4. 2 Br. Action sur. le case, 76. So "If inn-keeper will not lodge a man the constable shall upon complaint oblige him." Cromp, J. P. 201. In what way the officer of the vill could oblige the inn-keeper to receive guests does not appear, and whether he was punishable by indictment at the sessions or presentment at the leet. This common law cognizance has been assumed by the justices, and perhaps has been confounded with the jurisdiction given them over alehouse-keepers by the statutes of excise. And it is also said, "Inn-keepers are, in case of refusal, likewise subject to an action for damages at the suit of the party grieved." Godb, 346. Palm. 374. 2 Roll. R. 345.

(*m*) Said by Lord Kenyon, in Kirkman *v.* Shawcross, 6 Term R. 17.

(*n*) 11 & 12 W. 3, c. 15, s. 2.

(*o*) Co. Litt. 47, Francis *v.* Wyatt, 3 Burr. 1498.

§ 4. *Of his Lien.*

But as the law imposes a public duty upon him,
[*145] it gives him also the power of detaining the *person or property of his guest, until satisfaction be made for the entertainment afforded; otherwise he would be compelled to have recourse to legal process for every trifling debt, and often without the power of knowing or finding the person of his guest. But this detention seems to be only in the nature of a distress, for he cannot use or dispose of a horse, &c. so detained, (except in London or Exeter,(*p*) by particular custom;) and if the owner take him away, he can only retake him upon fresh pursuit; for if the custody of him be once gone the distress is lost. This does not however affect the property which he will acquire in the horse, if the owner agree to let it remain as a *pledge* for his meat, for then the party may retake him whenever he meets him.

(*p*) Jones v. Peake, 1 Stra. 556. In trover by a carrier, against an innkeeper for horses detained and sold by him for the charges of their keeping; held on demurrer, "That an innkeeper has no power to sell horses, except by custom in London; and besides, when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again." If a horse is at livery, and eats more than he is worth, an action lies against the owner, but the horse cannot be sold or used, Moor, 876; but by the custom of London and Exeter the horse may be sold, but see Popham, 127, Robinson v. Walter (Calye's case, supr.)

1 Hawk. 207, Doc. Abr. tit. Inns. By the custom of London and Exeter, if a man commit a horse to an inn-keeper, and he eats out his price, the inn-keeper may take him as his own, upon the reasonable apprehension of four of his neighbours, but the inn-keeper hath no power to sell the horse by the general custom of the realm."

*But this lien on the horse arises only out of the duty and obligation to the guest himself; if therefore the inn-keeper was not bound to receive the guest; or if the person leaving the horse never entered the inn as such guest, but only upon some agreement, the inn-keeper has only a remedy on the implied contract for keep, for he was not obliged to receive such a horse. But whether the horse really belongs to the guest, or not, is no question for the inn-keeper receiving him; his right of retainer is the same; he is not obliged to consider who is the owner, but whether he who brings him is a guest or not.

An inn-keeper cannot detain a horse for the reckoning of the guest, or of another horse, but only for the charge arising from the particular subject detained.

§ 5. *When waived.*

If the person putting up at an inn will not abide by the securities provided by the common law, but takes his own goods out of the inn-keeper's charge into his own, as by requiring the key of the room in which they are deposited, such special circumstances will exempt the inn-keeper.(q)

(q) In Com. Dig. tit. Action on the case for negligence, B. 2. "If the inn-keeper is desirous of locking up the goods, and will not otherwise warrant them, and the guest refuses, or if he says he is obliged to be absent and cannot take care of the goods, no action lies." This seems hardly to be reconciled with the reason in Cross v. Andrews, Cro, Eliz. 622, supr. or with what is said, Dalt. c. 56. Blackerly, 169, "That be-

*So where the guest is refused on account of the inn being full, but says he will shift for himself, as

ing charged by law for the things which come to his inn, he cannot discharge himself by such or the like words." So in,

42 Ass. 17. "Although the traveller does not leave his goods in his landlord's hands, but carries them with him up to the chamber assigned him, if he be there robbed, he shall have his action against the innkeeper." But in,

Spencer's case, Mic. 9 & 10 Eliz. Dyer, 266, b. Action on the custom against the host for packs of cloth stolen whilst in his inn, who, for his own excuse said, that he gave warning to the plaintiff, that if he would put his packs in a certain chamber within the inn, under lock and key, (tendered to him) he would undertake for their safety; but notwithstanding this warning the plaintiff cast them into an outer court at large, whence they were stolen; the opinion of the court was against the plaintiff. And in,

Clement *v.* Burgess, MS. Oxford Spr. Ass. 1815, coram, Baron Richards. Action by a guest, against the landlady of the Three Tuns, Oxford, to recover the value of a parcel stolen out of a room (not the common traveller's room), of which plaintiff was told he had the key, and might lock it; and the learned judge ruled, that the general liability of an innkeeper at common law, was in this case exonorated, by special circumstances of extreme negligence on the part of the guest; but on the authority of the fourth resol. Calye's Case, 8 Co. R. 65, supr. the court of K. B. granted a rule to show cause why the verdict obtained by the defendant should not be set aside; but, Lord Ellenborough, "I am at present of opinion, that the learned judge was right, and Lord Coke wrong; but having that case, take your rule. I have known several instances where it has been held, that if a guest takes his goods out of the inn-keeper's charge into his own, the latter is exempt."

The distinction seems to be, that, according to the fourth resolution alluded to, it is not competent to an inn-keeper to divest himself of his common law liability, by tendering the key to his guest, for then it would always be in his power to defeat the security which travellers have by the policy of the common law. But where the guest chooses to forego that security, and, by asking for the key, seems to take the goods into his own more immediate charge, so that the inn-keeper cannot exercise any particular care over them, he shall be exonorated from any loss or injury not arising from his own act or that of his servants The decision of the court on this point will very materially affect the security of the former, or the responsibility of the latter. Vid. App.

the relation of an accepted guest never *existed, so the inn-keeper cannot be made responsible.(r)

So if the guest desire the inn-keeper to put his horse out to pasture, the liability ceases, since the horse is no longer *infra hospitium;* but it is otherwise if the latter put him out of his own accord.(s) And it seems that if he desire the guest to lock the chamber, or to place the goods *in a particular [*152] room, or allege that he must be absent, he cannot disable himself, or refuse the duty which is imposed upon him by law as a public servant. But he will be exonorated by extreme negligence on the part of his guest under special circumstances.(t)

§ 6. *In case of Suit.*

Where goods are lost, &c. the plaintiff must also prove that the defendant kept such an inn, and that he, his son, or servant, was a guest at the time; and that the property was brought by them into the inn, and remained under the care of the defendant.

The action against the defendant should be in case on the custom of the realm, and the declaration express that he keeps a *common* inn.(u)

An indictment for refusing a guest will be quashable if it do not state that he was a traveller.(x)

In trover against an inn-keeper, for a horse de-

(r) Bennet v. Mellor, 5 T. R, 273. Bull. Ni. Pr. 73.

(s) Roll. Abr. 4. pl. 3, 4 But in the former case, if the inn-keeper be guilty of any negligence whereby the horse is lost or stolen, an action lies against him. Ibid. pl. 5.

(t) Burgess v. Clement, MS. supr. 150, and Appendix infra 158

(u) Calye's case, supr.

(x) 12 Mod. 445, case 775.

tained for the keep, denial will be no evidence of a converson, unless the party has tendered what the horse has eaten; and it is a question for the jury to say, if the sum tendered were sufficient.(*y*)

[*153] *An inn-keeper has such a property in the goods of his guest, that if stolen, they may be laid to be the property either of the innkeeper or the guest.(*z*)

(*y*) Buller, Ni. Pri. 45.

(*z*) Taylor's case, Leach's C. C. 356. Indictment for stealing the plate glasses of a coach, whilst standing in the coach-master's yard, who let it out on job. And it was objected, that the property should have been laid as the property of the person who hired it; but held by all the justices to be well laid. So in Jane Todd's case, July Sess. 1711, held per Eyre, Ch. J. and Ward C. B. that in the case of goods belonging to a guest stolen at an inn, they may be laid to be the property of the inn-keeper or the guest. Burnett's MS.

APPENDIX.

Regulations as to Porterage by Statute.

BY the Stat. 39 Geo. 3. c. 58, for every parcel not exceeding 56lbs weight, no greater sum can be demanded or charged than 3*d.* for a distance not exceeding a quarter of a mile, 4*d.* not exceeding half a mile, 6*d.* not exceeding one mile, 8*d.* not exceeding one mile and a half, 10*d.* not exceeding two miles, and so on, under a penalty not exceeding 40*s.* nor less than 5*s.*

Before any such parcel is sent from the inn, &c. a ticket shall be made out, whereon shall be distinctly marked the name of the inn, &c. from whence it is sent, the sums respectively due for the carriage and porterage thereof, and the christian and surname of the porter; and the same shall be delivered to such porter, together with the parcel, &c. And on default of such inn-keeper, warehouseman, &c. in so sending, they shall be liable to a penalty of 40*s.* So the porter, if he wilfully alter or deface such card shall forfeit 40*s.* or if he ask, or demand, or take, or receive any larger sum than is so written or expressed, he shall forfeit for each offence the sum of 20*s.* or he may be prosecuted by indictment, for obtaining money under false pretences, under Stat. 30 Geo. 2. c. 24. (vid. R. *v.* Douglas supr. 93.)

Parcels arriving in town by any conveyance for hire, other than stage-waggons, between the hours of four in the evening, and seven in the morning, shall be delivered within six hours after such hour in the morning; if arriving at any* other hour of the day, within six hours after such arrival, under a penalty not exceeding 20*s* nor less than 10*s.* [*155] And every parcel arriving by any public stage-waggon shall be delivered within twenty-four hours after such arrival (except directed to be left till called for) under a like penalty.

Every parcel so directed to be left, is to be delivered upon demand, by a person properly authorized to receive the same, without any other charge but what is justly due for the carriage, and twopence for the warehouse-room thereof, under a like penalty. If such parcel so directed be not called for in one week after arrival, a further charge may be made of one penny for every subsequent week it remains. If a parcel be not so directed, but before it is forwarded by the book-keeper, &c, in a course of delivery, if it be demanded by a person duly autho-

rized to receive the same, it shall be thereupon delivered to such person, upon payment of the sum of twopence for warehouse-room, and no more, under a like penalty.

If a porter misbehave himself to any one, upon complaint to any justice of the peace within whose jurisdiction the offence has been committed, or the offender reside, he may grant a warrant to bring before him such offender, and upon proof made upon oath of any such non-delivery, neglect, misconduct, or misbehaviour of such porter, &c. impose upon him a like penalty.

So if a person to whom a parcel, &c. is directed, refuses to pay what is justly due for such carriage, porterage, &c. a justice may, upon complaint, grant a similar warrant, and upon like proof award reasonable satisfaction to the party grieved for his damages and costs, and for his loss of time in recovering the same; to be levied, on non-payment, by distress and sale.

[*156] All informations under this statute must be made within fourteen days after the offence, and the penalties are recoverable before a single justice, with costs, one moiety to the poor of the parish in which the offenee was committed, the other to the party so prosecuting the offender to conviction. This act does not extend to authorise the employment of any porter, &c. in the delivery of parcels within the city of London, contrary to the laws and usages of the city.

LEVI *v.* WATERHOUSE, 1 Price's Exch. Cas. 20. p. 280.

CASE against a carrier for the loss of a parcel containing 200 guineas, delivered to the under book-keeper at the mail-coach office in Exeter, who booked it, and gave a memorandum acknowledging the receipt of it. It was proved that he knew the value of the contents, and had put it into the banker's bag for greater security. At the trial, Sum. Ass. Devon, 1814, Gibbs, Ch. J. ruled that the mere knowledge of the value did not take the present case out of the rule; and said that he thought there had not been such misconduct on the part of the defendant as made him liable; and refused to reserve the point. Upon motion for a new trial, on the ground of a misdirection of the Judge, it was said, per Thompson, C. B. in giving the judgment, "The question is, whether in this case the defendant is liable to the plaintiff for the loss of this parcel, which had been intrusted to his care for the purpose of carriage. On the trial the jury were directed, that the inference of the value being known to the defendant did not take the case out of the

protection of the notice that the defendant would not be responsible beyond a certain amount.* It was urged by the counsel for the plaintiff, [*157] that this case came within the principle of the determination in Beck *v.* Evans. (16 E. R. 244.) But it seems to us that the chief justice's direction was right, and such an one as ought to have been given under the circumstances proved. Here there was a special notice given by the defendant that he would not be answerable but on certain terms; and there is nothing proved to have been done on his part which amounts to a dispensation with that notice. It appears that the book-keeper might have inferred that this parcel was one of value; but nothing was distinctly said about the actual value, nor did he undertake that notice should be dispensed with." Said also "that the court (of K. B.) decided against the carrier on that occasion (Beck *v.* Evans) on the ground of gross negligence and nonfeazance."

With respect to the preceding case, it may be observed; that according to the report of the case of Beck *v.* Evans, it does certainly appear to have been the opinion of the court, that the notice of the carrier did not protect him in cases where no doubt could be entertained that the goods were above the value of *5l.* In the above case it seems that the value of the parcel was only to be inferred; "nothing was distinctly said about the value;" if so, a parcel of that nature was precisely within the rule laid down by Le Blanc, J. "That carriers were exempted from liability where the goods are of a much larger value than from a knowledge of their bulk, or quality, they could possibly guess to them to be."

If the two cases are not really to be distinguished by that difference in circumstances, it will be difficult to reconcile the principles upon which the judgments of the courts were founded.

*BURGESS *v.* CLEMENTS. (vid. supr. 150 and 152.) [*158]

Trin. Term. 55 Geo. 3. The rule to set aside the verdict in this cause came on to be argued, when it appeared that the plaintiff had been accommodated by the landlady with a private room to exhibit his wares, jewellery, &c. the door of which opened into the gateway; the landlady had given him the key, and cautioned him to bolt the door: the window opened into the street; there were candles in the room, and no curtains drawn. The loss happened at night; and the plaintiff had gone out, leaving the key in the door, and the candle burning, which the defendant afterwards went in and put out. The counsel in support of the rule, cited the 4th resolution in Calye's case, East India Co *v.* Pullen, 2 Str.

690. Com. Dig. Action against carrier, c. 1. 299. Moor, 158. Dyer, 266. Against which were opposed the authorities of Moor, 78, & 5 T. R. 273. vid. supr. And the judges gave their opinions as follow:

Lord Ellenborough—We cannot see any ground for impeaching the fidelity of the jury in this case, although the facts of the case might have been commented on more at large by the learned Judge than appears from his report; and he might have availed himself more decidedly of the rights of his own province in laying down the law. But the question is, whether the jury have rightly exercised their province. An inn-keeper is bound to keep the goods of his guest, *hospitandi*; so that no loss *eveniat pro defectu hospitatoris*. The Court did not mean to say, that where goods are stolen it was not *prima facie* evidence of defect of care on the part of the landlord; but under circumstances the landlord might no doubt be exempt; as in this, where the plaintiff's [*159] conduct not only concurred, but induced the loss. *Calye's case allows that where the guest introduces the thief, the landlord shall not be answerable. The questions in this case were therefore, 1st. Whether the plaintiff took the apartment *animo hospitandi*; and 2dly, Whether his own conduct did not conduce to the loss. Upon the evidence it appeared that the plaintiff asked for a particular room to show his goods; Now a landlord is not bound to find his guest exhibit-rooms for the purpose of expanding his goods—he is not bound to provide shops, but convenient lodging for his guests. The court agreed with the case in Moor, that the mere delivery of the key of a room would not dispense with the care and attention due from the landlord, and that he could not exonerate himself by merely handing over a key to his guest; but if the guest takes the key, it is a proper question for the jury, Whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability. Lord Coke also laid it down, that if the guest's servant, companion, or fellow-lodger, rob him, the landlord is not liable; and in this case the plaintiff called strangers together for the purposes of a show, and invited the admisson of persons into the room, upon whose approach and access the landlord had no check. This was evidence of an user of the inn for purposes aliene from those *hospitandi*; and it was hard to call upon the inn-keeper to protect property in a room used for these purposes. It appeared that the defendant advised the plaintiff to bolt his door, for there were strangers about; and after this suspicion had been communicated to him, he was obliged to use diligence in protecting his own property. Ordinarily, a guest certainly had a right to rest on the protection of his landlord; but after the latter's fears expressed, and admonition given, he was bound to use some degree of caution himself.

[*160] *Mr. Justice Bayley.—I am not of opinion that any other verdict would have been wrong. The plaintiff's acceptance of the key in this

case superseded the liability of the innkeeper; the plaintiff asked for a room, not for an ordinary purpose, and for which the defendant was not bound to find one; and therefore the defendant gave the plaintiff the key of the room; he took it; but if he had said, "This shall not discharge your liability—look you still to that," the defendant would have replied, "then you shan't have the room." The defendant had a right to refuse the room for the purpose in question, or to concede it upon any terms she chose; I think she did so upon the terms of the plaintiff's taking the custody of his goods into his own hands with the key of the room; and that he accepted the key on those terms. He did not make a communication to her when he left the room that her responsibility might revive. To decide otherwise would be making the innkeeper liable, not for his own, but for his guest's negligence.

Mr. Justice Dampier.—If it had been left to the jury, whether the plaintiff had not accepted the key upon those terms, there would have been no doubt of the verdict being right. My only doubt was, whether the law had not been left to the jury, and not distinctly laid down by the learned judge. To grant a new trial would only put the parties to useless expense, for the verdict would certainly be the same.—*Rule discharged.*

Waiver of the Notice of Value.

Down *v.* Fromont, 4 Camp. 40. Action against a carrier for loss of a package to be carried from London to Glastonbury, consisting of a hamper of the dimensions of twelve by eighteen inches. *The defendants relied upon the effect of a notice, by which they restrained their liability to answer for any package, cash. jewels, &c. of however small a value, and for any package of more than 5*l.* value, if lost, &c. unless the same was specified when delivered into their office; no such specification had been made; but the plaintiffs relied upon the case of Beck *v.* Evans, (supra) that from the circumstance of its apparent bulk, the notice did not protect the carrier. But per Lord Ellenborough, "I do not think the case cited governs the present; there, the carrier knowing that the article entrusted to him was a cask of brandy, necessarily knew it was above the value of 5*l.* But here, what was there to indicate the contents or the value of this package? It might have contained cash, &c. to the amount of 1,000*l.* or it might have been filled with coarse materials not worth 40*s.* It therefore appears to me to be a package within the meaning of the notice. I am sorry, for the convenience of trade, [*161]

that carriers have been allowed to limit their common law responsibility; and some legislative measure will soon become necessary. But I feel myself bound by the decisions, that such notices, in cases where they apply, constitute a special contract between the parties."

Stoppage in Transitu.

LOESCHMAN *v.* WILLIAMS, 4 Camp. 181. Trover for a piano-forte, by the vendor, against the packer of the vendee; the instrument was sold for ready money on delivery to the defendant, but when it was carried to his warehouse it was said no orders had been given for payment; the [*162] servant *however left it upon an understanding that it should be delivered to the purchaser only on his paying for it. And per Lord Ellenborough, "Allowing that upon an absolute delivery of goods to the packer of the purchaser, who has no warehouse of his own, the *transit* is at an end, I think the plaintiff had a right to resume the possession of this piano-forte after it had been delivered to the defendant. That delivery was only conditional, and he remained a trustee for the plaintiff. It was a contravention of duty therefore to deliver it to the purchaser until it had been paid for."

Misdelivery.

SILLS *v.* LAING, 4 Camp. 81. Plaintiff, a wharfinger, delivered goods by mistake to the defendant, who used them in the way of his trade; the plaintiff had been called upon by the owner, and had paid him the value, and now sought to recover it from the defendant in an action for *money paid.* But Lord Ellenborough held that the plaintiff ought to have declared specially, and directed a non-suit.

Freight.

SHEELS *v.* DAVIES, 4 Camp. 119. *Assumpsit* for freight of butter; defence was, that in consequence of bad stowage defendant had derived no benefit from the carriage; but Gibbs, Ch. J. held, "that the bad stowage of the goods was the subject of a cross action, and did not affect the right to the freight."

Evidence.

STROTHER *v.* WILAN and others, 4 Camp. 24, Action against the owners of the Stroud coach for the loss of a parcel. To prove the ownership, the plaintiff put in evidence the registry books kept in Somerset-House of licenses granted, which, it was contended, was *prima facie* evidence of the ownership of the defendants. But per Gibbs, Ch. J. "The entry not being signed by the defendants, and nothing being shown to connect them with it, I am of opinion that it is no evidence whatever to prove them to be the owners of the coach. It is clearly not evidence at common law; and no act of parliament is pointed out to me to make it evidence of ownership.—*Plaintiff nonsuited.*

Inn-keeper.

In DOE *v.* LANING, 4 Camp. 77. Upon a question, whether a coffee-house came within the description of an inn, so as to vacate the insurance policy for not being entered as doubly hazardous, and a premium paid accordingly; said, per Lord Ellenborough, "I think a coffee-house is not an inn within the meaning of the policy. Horses, waggons, and coaches come to an inn; there are stables and out-houses attached to it; people are going to these with lights at all hours; hence there is an increased danger of fire, and the trade of an innkeeper is considered doubly hazardous. But the trade of a coffee-house keeper is of a very different description."

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